PROSECUTING AND DEFENDING ATTORNEYS’ FEES IN TEXAS

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MAY 10, 2019
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Prosecuting and Defending Attorneys’ Fees in Texas

I. INTRODUCTION

Attorneys’ fees claims are often treated as the proverbial stepchild of damages. Perhaps familiarity breeds contempt. However, attorneys’ fees often comprise the largest element of damages, sometimes dwarfing all other damages combined. Yet, attorneys often neglect to work them up the way they would a similarly sized damages claim. For instance, attorneys frequently do not hire fee experts, presuming that trial counsel can adequately handle the issue either as a witness or through cross-examination. Whether prosecuting or defending, we propose that litigators stop neglecting attorneys’ fees development now.

This paper focuses on the origins and sources of attorneys’ fee awards, how courts have applied the law on attorneys’ fees, and how litigators can plan for and effectuate an attorneys’ fee claim. We discuss Texas law, which for the past 40 years the plurality has been Chapter 38 of the Texas Civil Practice and Remedies Code (“Chapter 38”) and its predecessors, articles 2178 (enacted in 1909) and 2226 (2178 as renumbered in 1923) of the Texas Revised Civil Statutes. Chapter 38 is a unique statutory ground for recovering attorneys’ fees.

In 1977, the legislature amended Article 2226 and added “suits founded on oral or written contracts” to the list of claims entitling a party to attorneys’ fees. As a result, Chapter 38 has flooded Texas’s attorneys’ fees jurisprudence with respect to contract claims. Differentiating between purely contract-based cases and contract cases brought under Chapter 38 is difficult as the lines are often blurred in published opinions. Where possible, we have tried to identify distinctions. The Texas Supreme Court has recognized that the “parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38’s.” Intercontinental Group P’ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 653 (Tex. 2009). Ultimately, for purely contractual cases, our advice is follow the provisions of the contract and, where the contract is silent, fill in the gaps with Chapter 38.

While extensive, this paper does not and could not address every reported case on Texas attorneys’ fee awards; so it is not intended to address every conceivable issue that could arise in these claims. Likewise, while we have cited a handful of federal cases in this paper, Texas practice and procedure does not always transfer seamlessly into federal court, even in diversity jurisdiction cases. And, given Chapter 38’s uniqueness, this paper does not provide any guidance for handling cases governed by other states’ substantive law or federal law. For a primer on federal court attorneys’ fees practice and procedure, see the authors’ DRI article, entitled “Recovering Attorney’s Fees in Federal Court.” https://www.strongpipkin.com/wp-content/uploads/Recovering-Attorneys-Fees-in-Federal-Court.pdf

We have also not attempted to catalog every Texas statute authorizing attorneys’ fees or their individual idiosyncrasies; however, we have listed a number of them that have arisen in the cases we have read over the past few years and put them in Section VI. Certain Causes of Action, infra at p. 104. From having read numerous cases, the Chapter 38 jurisprudence generally tends to bleed into the other statutes and vice-versa; however, you will need to research your individual statute to determine any significant substantive or procedural differences.
While this paper has become more and more comprehensive over its several iterations, every time we look at the issue, we find something new. We suspect you will find even more. If you do, let us know. We would be happy to update this paper with your suggestions.

II. TEXAS FOLLOW THE AMERICAN RULE

Texas follows the American Rule, which provides that litigants may recover attorneys’ fees only if specifically provided for by statute or contract. See Epps v. Fowler, 351 S.W.3d 862, 865 (Tex. 2001). So, the starting point on every attorneys’ fees claim is identifying a statutory or contractual ground permitting the recovery of attorneys’ fees.

For contractual attorneys’ fee claims, most states require that the contract have an express provision providing attorneys’ fees for the prevailing party, sometimes referred to as prosecuting fees. A standard contractual analysis should be undertaken to determine whether any such obligation is enforceable. For all other attorneys’ fee claims, a statutory ground must authorize the recovery. While there are a number of statutes that provide for the recovery of attorneys’ fees, the most common statute utilized in civil litigation in Texas is Chapter 38.

III. CHAPTER 38

A. Statutory Language

Section 38.001 provides that: “A person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;
(2) performed labor;
(3) furnished material;
(4) freight or express overcharges;
(5) lost or damaged freight or express;
(6) killed or injured stock;
(7) a sworn account; or
(8) an oral or written contract.”

TEX. CIV. PRAC. REM. CODE § 38.001. Thus, the statute provides for recovery of reasonable attorneys’ fees from an individual or corporation upon a successful prosecution of any of the enumerated types of claims, including breach of contract cases.

1. Only Reasonable Attorneys’ Fees Are Recoverable

Interestingly, the statute never uses the word “necessary” in describing attorneys’ fees. At least one case has draw a distinction. See Sullivan v. Abraham, No. 07-17-00125-CV, 2018 Tex. App. LEXIS 1196 (Tex. App.—Amarillo Feb. 13, 2018, no pet.) (mem. op.). In Sullivan, the Amarillo Court of Appeals noted that sections 27.009 and 38.001 differ from section 37.009 in that only the
latter requires both reasonable and necessary attorneys’ fees, whereas the former two only require that the fees be reasonable. See id. at *2-3. The court explained:

This omission of the word is of import since its absence causes the standard for awarding fees to differ. Simply put, it apparently relieves the party seeking the fees from proving that they were necessary.

Id. at *3-4 (compiling supporting cases). However, in Sullivan, the trial court’s application of the reasonable and necessary standard was harmless error as the parties agreed to use the lodestar method, which requires that fees be reasonable and necessary.\(^1\) See id. at *6-7.

(a) Contractual Provisions May Not Require the Reasonableness Limitation

While section 38.001 permits only reasonable attorneys’ fees, contractual provisions may not be so limited. In Basic Energy Services, L.P. v. Exco Resources, Inc., the trial court awarded summary judgment to Exco on a contractual indemnity claim and awarded all of the attorneys’ fees it sought both for prosecuting the indemnity action as well as fees and costs for defending other defendants’ cross claims against Exco due to the breadth of the language “all litigation cost” in the fee provision. No. 05-15-00667-CV, 2018 Tex. App. LEXIS 782 (Tex. App.—Dallas Jan. 26, 2018, pet. filed) (mem. op.). Stressing that it was dealing with two sophisticated parties, the Dallas Court of Appeals affirmed the summary judgment rejecting Basic’s argument that a reasonableness standard should be implied and explained:

[the plain language of the contract provides for “all expenses of litigation, court costs, and attorneys’ fees which may be incurred by Company Group . . .” and does not include any requirement that such amounts must be subsequently subjected to scrutiny for reasonableness. See Great Am. Ins. Co. v. Primo, 512 S.W.3d 890, 893 (Tex. 2017). . . Accordingly, in view of the fact that the agreement at issue here was between two sophisticated, commercial entities presently familiar with the expenses of litigation, court costs and attorney’s fees and free to negotiate and structure their affairs as they sought fit, we see no reason to impose additional procedures beyond those they chose for themselves.

Id. at *18-19. The Dallas Court of Appeals distinguished cases involving unsophisticated individuals or consumers for which a reasonableness standard would be implied. See id. Once again, be careful what you bargain for.

Conversely, where the contract language calls for “reasonable attorneys’ fees,” the party seeking recovery of fees must prove their reasonableness, which is usually a fact question. See generally, Carto Props., LLC v. Briar Capital, L.P., No. 01-15-01114-CV, 2018 Tex. App. LEXIS 1186 at *29-42 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. denied) (mem. op.) (guaranty and underlying note both provided for “reasonable attorneys’ fees”).

\(^1\) See infra at p. 45 Section V. Proving Attorneys’ Fees, Part D. Electing the Lodestar Method which discusses cases involving plaintiffs inadvertently electing the lodestar method. This is another potential detriment to electing the lodestar method, intentionally or otherwise.
(b) Some Statutes Do Not Require the Reasonable and Necessary Limitation

Section 42.006(a) of the Family Code provides for recovery of “the actual costs and expenses incurred, including attorney’s fees.” T EX. FAM. CODE § 42.006(a). Citing this provision, the Houston First Court of Appeals rejected appellant’s argument that the claimant should be required to establish that her attorneys’ fees were reasonable and necessary and, instead, required only proof of fees incurred. See Guimaraes v. Brann, 562 S.W.3d 521, 546 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet. h.).

2. Contract Broadly Interpreted

The courts have found a broad array of agreements to constitute contracts. An agreed divorce decree is treated as a contract, the breach of which will support the award of attorneys’ fees under Texas Civil Practice and Remedies Code section 38.001(8). See Seabourne v. Seabourne, 493 S.W.3d 222, 231-32 (Tex. App.—Tanekana 2016, no pet.). Similarly, suit on an agreed judgment sounds in contract supporting a Chapter 38 claim for attorneys’ fees. See Assets v. Chenevert, 557 S.W. 3d 755, 773 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (citing Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 71 (Tex. 1997)). Likewise, enforcement of a settlement agreement or release is governed by the law of contract and plaintiff is entitled to Chapter 38 attorneys fees for breach of the settlement agreement, even if it releases attorneys’ fees. See Am. Fisheries, Inc. v. Nat’l Honey, Inc., No. 01-17-00340-CV, 2018 Tex. App. LEXIS 6111, at *30-32 (Tex. App.—Houston [1st Dist.] Aug. 7, 2018, pet. denied).

(a) Bailment May Constitue a Contract Claim

While not reaching the ultimate question, the Houston Fourteenth Court of Appeals recognized that:

[a] claim based on a bailment can be brought either as a contract claim or as a tort claim, depending on the particular facts of the case and the type of action the plaintiff chooses to assert. See, e.g., Barker v. Eckman, 213 S.W.3d 306, 310 (Tex. 2006) (citing Elder, Dempster & Co. v. St. Louis S. R. Co., 105 Tex. 628, 154 S.W. 975, 987-88 (1913) (examining plaintiff's pleadings to determine whether a claim for breach of bailment agreement sounded in tort or contract)).

Palfreyman v. Gaconnet, 561 S.W.3d 258, 262 n.6 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Ultimately, the court found that Palfreyman had pleaded her case as a negligence claim and had waived the issue by failing to raise it in her initial brief. See id. The Thirteenth Court of Appeals has also addressed the issue, finding that a bailment is a contract action to which a fee recovery may attach. See Allright, Inc. v. Guy, 696 S.W.2d 603, 605 (Tex. App.—Corpus Christi, 1985, no writ) (“This court has previously specifically held that bailment is a contract action and therefore attorney fees are recoverable under article 2226 [predecessor to Chapter 38].”).

2 Petition for review due May 6, 2019.
(i.) PRACTICE POINTER: Determine Whether the Bailment Pledged as a Contract.

If you intend to seek attorneys’ fees based on a bailment, you must be sure to plead it as a contract. Conversely, if plaintiff’s cause of action smacks of tort, the defendant should argue the bailment does not support fees under Chapter 38.

3. Recovery Permitted for Quantum Meruit Claims

As explained above, section 38.001 provides for attorneys fees in contract claims. It is also true that if an express or implied-in-fact contract exists, a claimant is barred from recovering in quantum meruit. See Chico Auto Parts & Serv., Inc. v. Crockett, 512 S.W.3d 560, 579 (Tex. App.—El Paso 2017, pet. denied). So, given these legal principles and the statutory construction principle of *expressio unius est exclusio alterius*, Chapter 38 logically should not support an attorneys’ fees award grounded in quantum meruit. However, it apparently does:

The statute also allows for the recovery of fees in a suit for quantum meruit. See Weitzul Constr., Inc. v. Outdoor Environments, 849 S.W.2d 359, 366 (Tex. App.—Dallas 1993, writ denied); Angroson, Inc. v. Indep. Commc’n, Inc., 711 S.W.2d 268, 274 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).


4. No Recovery for Pets under Section 38.001(6)

Section 38.003 provides for attorneys fees in suits for killed or injured stock; however, the term “stock” is not defined in the statute and is rarely used in other Texas statutes. Relying in part on dictionary definitions as well as Penal Code definitions of livestock and non-livestock, the Houston Fourteenth Court of Appeals determined that pet dogs owned by individuals for companionship (i.e. not kept to breed, show, or otherwise make money, not for sale, and having no special economic value beyond the personal value to their owner) are not stock under section 38.001(6). See *Palfreyman*, 561 S.W.at 262.

5. If Pledged and Proved, Attorneys’ Fees Are Mandatory under Chapter 38

While the statutory language uses the phrase “may recover,” the Texas Supreme Court has ruled that this language used in Chapter 38 and numerous other statutes is, in fact, mandatory and a judge or jury has no discretion to award no fees when a claim is pleaded and evidence adduced. *See State v. Buchanan*, No. 03-18-00120-CV, 2019 Tex. App. LEXIS 2340, at *5-7 (Tex. App.—Austin Mar. 27, 2019, no pet. h.) (compiling Texas Supreme Court cases interpreting “may recover” statutes as mandatory and specifically citing *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) for its interpretation of Chapter 38). In *Buchanan*, the Austin Court of Appeals rejected the defendant’s argument that the State waived its mandatory fees issue when it did not object to the
jury issue submitted that asked: “What is a reasonable fee, if any, … .” See id. at *4-5. The court noted that the availability of fees under a statute is a matter of law and a jury finding about the amount is immaterial. See id.. Additionally, the court noted that the State raised the issue in at least two post-trial motions. See id.

6. Only Attorneys’ Fees are Recoverable, Not Expenses

Citing only the statute itself, the Dallas Court of Appeals has held that Chapter 38 does not permit recovery of litigation expenses. See Kartsotis v. Bloch, 503 S.W.3d 506, 520 (Tex. App.—Dallas 2016, pet. denied). In Leteff v. Roberts, the Houston First Court of Appeals noted that Texas statutes differentiate between attorneys’ fees and costs and, in order to recover the latter, the statute must expressly provide for recovery of costs, which it recognized Chapter 38 does. 555 S.W.3d 133, 140 (Tex. App.—Houston [1st Dist.] May 22, 2018, no pet.) (“Generally, attorneys’ fees and costs are mutually exclusive3 However, “costs” usually refers to fees and charges required by law to be paid to the courts or their officers, the amount of which is fixed by statute or rule. See Sterling Bank v. Willard M, L.L.C., 221 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

7. Fees Exceeding Damages Award can be Reasonable

As a general rule, fees can (and often do) exceed other damages. This does not render such an award unreasonable. See Hejin Hong v. Nations Renovations, LLC, No. 05-15-01036-CV, 2016 Tex. App. LEXIS 13838, at *20 (Tex. App.—Dallas Dec. 29, 2016, pet. denied) (mem. op.) (“[A]s we said in Metroplex Mailing, there is no rule that fees cannot exceed the amount recovered.”); Metroplex Mailing, 410 S.W.3d at 889, 900-01 (concluding evidence was legally and factually sufficient to support award of over $500,000 in attorneys’ fees on recovery of $40,000 damages for breach of contract). The amount in controversy is merely one of several factors to be considered by the jury in determining the amount of a reasonable fee.

However, if the award of attorneys’ fees greatly exceeds the damages, it could raise an issue regarding the relative reasonableness of the requested fees. An objection to an award of such fees, though, is necessary. See Crisp Analytical Lab, L.L.C. v. Jakalam Props., Ltd., 422 S.W.3d 85, 93 (Tex. App.—Dallas 2014, pet. denied). In Crisp, the jury found a breach of contract, awarded a mere $513.00 in damages, and awarded nearly $50,000 in attorneys’ fees. Nevertheless, the Dallas Court of Appeals, in affirming the award, noted that the defendant had not objected to the overall reasonableness of the amount of fees relative to the amount demanded, sought at trial, or awarded. In Revelts v. Cross, a case with arguably $15,000 in dispute, the defendants objected to the total fees requested, $259,560, as unreasonable and excessive, even thought they did not object to the amount of time spent on any single entry or to the rates charged by the plaintiffs’ attorneys ($400 per hour for partners, $200 per hour for the associate, and $120 per hour for paralegals). See 968

3 In comparing a handful of statutes that do and do not award costs, the Houston First Court of Appeals reported that Texas Finance Code section 305.005 does not provide for costs, but Texas Finance Code section 396.351(b), Texas Civil Practice and Remedies Code section 27.009(a)(1), and Texas Civil Practice and Remedies Code section 38.001 expressly make both “costs” and “attorney’s fees” recoverable to certain parties. See Leteff, 555 S.W.3d at 140.
The district court relented and reduced the fees by 25% after recognizing:

[T]he “strong presumption” that the lodestar amount is reasonable, and it should only be those “rare circumstances” in which the lodestar does not adequately reflect a reasonable fee. See Perdue v. Kenny A., 559 U.S. 542, 130 S.Ct. 1662, 1672–73, 176 L.Ed.2d 494 (2010). However, in the present case, the totality of the circumstances and the nature of the claims ultimately presented cause the Court to conclude that the total attorneys’ fees amount sought by Plaintiff is excessive.

Id. at 850.

(a) PRACTICE POINTER: Object to the Overall Fee as Unreasonable and Excessive

If fees greatly exceed the amount demanded, tendered, sought, or recovered, a debtor/defendant should follow the example in Reyelts and raise an objection to the overall fee as being unreasonable and excessive given the facts and circumstances of the case. If need be, raise the objection for the first time in post-trial or even post-judgment motions before the trial court.

8. Attorneys’ Fees are Only Recoverable From Individuals and Corporations, Not Partnerships, Limited Partnerships, or Limited Liability Companies

In a suit over how to split plaintiffs’ fees, the Fourteenth Court of Appeals, after engaging in statutory construction, determined that attorneys’ fees claims under Chapter 38 are strictly limited to “individual[s] or corporation[s],” precluding recovery from limited liability partnerships. See Fleming & Associates, LLP v. Barton, 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Since that decision, the Texas legislature introduced a few bills each session to amend section 38.001 to include non-governmental entities like partnerships and limited liability companies; however, all of the bills failed.4 In the meantime, Fleming & Associates has been cited with approval by other Texas courts of appeal. One case considering the issue is CBIF, Ltd. Partnership v. TGI Friday's Inc., which summarized the state of the law as follows:


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4 Two examples of the proposed bills are attached in Appendix A.
App.—Houston [1st Dist.] May 31, 2018, pet. filed) (citing numerous cases); Phoneteren, LLC v. Drawbridge Design, No. 05-17-00890-CV, 2018 Tex. App. LEXIS 4986, at *5-6 (Tex. App.—Dallas July 3, 2018, no pet.) (mem. op.) (rejecting plaintiff’s argument that the trial court did not “act unreasonably” in awarding fees under Chapter 38 against an LLC as the judgment was entered jointly and severally against it and another defendant). However, this defense can be waived if not raised in the trial court. See Puig v. High Standards Networking & Computer Servs., No. 01-16-00921-CV, 2017 Tex. App. LEXIS 10063 at *14-15 (Tex. App.—Houston [1st Dist.] Oct. 26, 2017, no pet.) (mem. op.) (wherein the defendant, a professional organization, failed to preserve in the trial court its complaint that section 38.001 does not authorize attorneys’ fees against it).

(a) PRACTICE POINTER (Debtor/Defendant): Object, Plead Affirmative Defense, and Move for Summary Judgment

So, if you represent a partnership, limited liability partnership, limited liability company, or limited partnership, you should plead this as an affirmative defense and move for summary judgment.

(b) PRACTICE POINTER (Claimant): Check Your Contract Provisions and Plead Appropriately

If your contract with a partnership, limited liability partnership, limited liability company, or limited partnership provides for recovery of attorneys’ fees, then do not seek recovery under Chapter 38. Instead, seek recovery under the terms of the contract. See Republic Capital Grp., LLC v. Roberts, No. 03-17-00481-CV, 2018 Tex. App. LEXIS 8703, at *23-24 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op.) (holding that the Chapter 38 prohibition on recovering from limited liability companies did not apply where plaintiff sought fees under a contractual provision instead of Chapter 38).

Do not even cite to Chapter 38 in your pleading unless you very specifically recite that you are seeking fees both under the contract and under the statute. Do not fall victim to waiver of your contractual right as occurred in Vast Construction, LLC v. CTC Contractors, LLC. See 526 S.W.3d 709 (Tex. App.—Houston [14th Dist.] 2017, no pet.). In that case, CTC claimed it was entitled to attorneys’ fees under the contract as well as Chapter 38. Id. at 724. However, the Fourteenth Court of Appeals disagreed, holding:

The record shows that CTC did not plead for attorneys’ fees under the Subcontract; instead, it sought attorneys’ fees only under “Chapter 38 of the Texas Civil Practice & Remedies Code.” When, as here, a party pleads a specific ground for recovery of attorneys’ fees, the party is limited to that ground and cannot recover attorneys’ fees on another, unpleaded ground. See Tex. R. Civ. P. 301 (stating that judgment must conform to pleadings); see also Intercont’l Grp. P’ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 659 (Tex. 2009) (holding that party waived its right to recover attorneys’ fees under contractual provision by pleading for attorneys’ fees only under Chapter 38); Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P., 417 S.W.3d 46, 61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (“In light of this difference in application of statutory and contractual attorney’s fees, and because a court’s judgment must conform to the pleadings, see Tex. R. Civ. P. 301, a party who pleads for attorney’s fees only under Chapter 38 waives its claim for attorney’s fees under
a contractual provision.”); Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc., 416 S.W.3d 642, 660 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Thus, CTC waived any claim for attorneys’ fees under the Subcontract by failing to plead it.

Id. at 728. In a footnote to the opinion, the Fourteenth Court of Appeals commented that “[l]egislation was proposed to amend section 38.001 to reflect that a person may recover reasonable attorneys’ fees from ‘organizations,’ including limited liability companies, but the bill did not pass.” See id. at n.16 (citing Tex. H.B. 744, 85th Leg., R.S. (2017)).

B. Recovering Attorneys’ Fees under Chapter 38

Chapter 38 requires the satisfaction of three elements for the recovery of attorneys’ fees:

1. the claimant must be represented by an attorney;
2. the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
3. payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.


1. Only Claimants May Recover


However, a cross-plaintiff or counter-plaintiff is a “claimant” and may recover under Chapter 38 assuming all other pre-requisites are met.

(a) PRACTICE POINTER: Defendants Should Consider an Offer of Settlement under Rule 167 and Chapter 42

If the plaintiff is entitled to recover attorneys’ fees, a defendant who has no counterclaim may consider an offer of settlement under Texas Civil Practice & Remedies Code chapter 42 and its corresponding Texas Rule of Civil Procedure 167 in order to attempt make a claim for attorneys’

5 Once again, in the 2019 legislature, Texas senators and representatives have introduced numerous bills to “fix” the issue. A partial list includes: HB 370, SB 471, HB 2457, and HB 2533.
fees. Only defendants can trigger these provisions; however, they are loath to do so in cases in which the plaintiff has no cause of action allowing for recovery of attorneys’ fees. This downside risk does not exist in a case in which the plaintiff has a right to recover attorneys’ fees under Chapter 38. For greatest effect, the declaration (Rule 167.2(a)) and offer should be made as soon as possible. For an example of this strategy working in a DTPA case review the Salinas v. State Farm Lloyds & Truman Dale Crews opinion. See No. 13-18-00129-CV, 2019 Tex. App. LEXIS 2893, at *1 (Tex. App.—Corpus Christi Apr. 11, 2019, no pet. h.) (mem. op.).

2. Represented by an Attorney


3. Presumption and Judicial Notice

One reason to seek attorneys’ fees under Chapter 38 is to take advantage of its presumption and judicial notice provisions, which can sometimes be used to bridge the gaps in attorneys’ fees proof. However, no such presumption or right to judicial notice apply to fees sought under a contractual provision. This stark lesson was impressed upon a father in a child support dispute in which the divorce decree awarded attorneys’ fees to the prevailing party. See In the Interest of A.N.Z., No. 05-15-01443-CV, 2017 Tex. App. LEXIS 5211 (Tex. App.—Dallas June 7, 2017, no pet.) (mem. op.). There the father prevailed and attempted to have the trial court take judicial notice of his fees. However, the trial court refused and was upheld on appeal with the Dallas Court of Appeals explaining:

Father argues on appeal that the trial court could take judicial notice of the usual and customary attorney’s fees under section 38.004 of the civil practice and remedies code. Tex. Civ. Prac. & Rem. Code Ann. § 38.004 (court may take judicial notice of usual and customary attorney’s fees and contents of case file where amount of attorney’s fees is submitted to the court by agreement). The usual and customary attorney’s fees for a claim described in section 38.001 are presumed reasonable. Id. § 38.003. However, Father sought attorney’s fees specifically under the Fee Provision. He did not request attorney’s fees pursuant to section 38.001, and the trial court’s findings indicate the court awarded attorney’s fees under the Fee Provision, not section 38.001. Tex. R. Civ. P. 299 (findings of fact filed by trial court form basis of judgment upon all grounds of recovery and defense embraced therein). Because Father asserted his claim for attorney’s fees under the Fee Provision and not section 38.001, the trial court could not take judicial notice under section
38.004. Ahrenhold v. Sanchez, 229 S.W.3d 541, 544 (Tex. App.—Dallas 2007, no pet.); Charette v. Fitzgerald, 213 S.W.3d 505, 514-15 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (parties that did not seek or obtain attorney’s fees under section 38.001 could not rely on sections 38.003 and 38.004 to “bridge the gap left by the lack of evidence of the reasonableness of their attorney’s fees”).

Id. at *7-8.

The judicial notice provision can also be used to allow the trial court to take judicial notice, even doing so sua sponte, of the reasonable hourly rate charged in the locality. Sullivan v. Abraham, No. 07-17-00125-CV, 2018 Tex. App. LEXIS 1196 at *23, Fn. 9 (Tex. App.—Amarillo Feb. 13, 2018, no pet.) (citing Charette v. Fitzgerald, 213 S.W.3d 505, 514-15 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (so holding while also noting there to be a split of authority on the issue)).

4. Presentment

Presentment is an essential element of a claimant’s remedy for attorneys’ fees under Chapter 38.6 It requires that the claimant provide notice to the respondent of the potential cause of action that could include the recovery of attorneys’ fees. Proving that a plaintiff that is relying on Chapter 38 for the recovery of attorneys’ fees failed to present the claim is one of the few absolute defenses to such an attorneys’ fee demand. Thus, presentment is critical to both the prosecution and the defense.

It is important to note that presentment is an explicit requirement of section 38.002. If the plaintiff is relying on an attorneys’ fees provision in a contract or another statute, reviewing that contractual provision or other statute is necessary to determine if a presentment requirement exists. The courts will not read a presentment requirement into a contract. For instance, in Fortitude Energy, LLC v. Sooner Pipe LLC, the plaintiff in a breach of contract case sought attorneys’ fees under both a contractual provision and Chapter 38, a good strategy if you have both available. See 564 S.W.3d 167, 185-187 (App.—Houston [1st Dist.] 2018, no pet.) (construing the word “fee” in the clause “together with all penalties, fees, interest, costs, and other expenses payable with respect thereto” to include attorneys’ fees in the resulting collection lawsuit). The defendant supported the trial court’s denial of the plaintiffs attorneys’ fees by arguing that it had failed to prove presentment. Id. at 186. In rejecting this argument, the Houston First Court of Appeals held: “When a party seeks attorney’s fees pursuant to a contractual provision allowing the recovery of such fees, the party need not prove presentment, which is a statutory procedural requirement.” Id. at 187. See also Morales v. Carlin, No. 03-18-00376-CV, 2019 Tex. App. LEXIS 2398, at *18-19 (Tex. App.—Austin Mar. 28, 2019, no pet. h.) (mem. op.) (“Presentment of a counterclaim for attorneys' fees as a ‘prevailing party’ pursuant to a contract provision is not required.”). However, if a contractual presentment requirement exists, it is more likely than not that the following section 38.002 jurisprudence would apply equally to those claims.

(a) Claimant Must Plead and Prove Presentment (and Right to Recover Attorneys’ Fees, with or without Presentment)


Presumably, if you plead and prove presentment, you will, in doing so, plead and prove the right to recover attorneys’ fees, which is necessary for recovery. The standard for pleading attorneys’ fees recovery is terribly low. See Anglo-Dutch Energy, LLC v. Crawford Hughes Operating Co., No. 14-16-00635-CV, 2017 Tex. App. LEXIS 9424, at *11-12 (Tex. App.—Houston [14th Dist.] Oct. 5, 2017, pet. denied) (mem. op.). In that case, defendant’s (who was the prevailing party and sought defensive attorneys’ fees under a contractual provision) live pleading acknowledged the validity of the contract and included a general request for attorneys’ fees. Id. at *11. Citing the fair notice standard, the Houston Fourteenth Court of Appeals ruled:

A general request for attorney’s fees is sufficient under the notice pleading standard. Dean Foods Co. v. Andersen, 178 S.W.3d 449, 453 (Tex. App.—Amarillo 2005, pet. denied); see also Tull v. Tull, 159 S.W.3d 758, 762 (Tex. App.—Dallas 2005, no pet.) (“A general request for attorney’s fees in the prayer of the pleading is itself sufficient to authorize the award of attorney's fees.”). Similarly, a pleading’s general invocation of an agreement that provides for attorney’s fees is sufficient to support an award of attorney’s fees under that agreement.

Id. at *12. Likewise, in Jackson v. Ali Zaher Enterprises, the Dallas Court of Appeals found that the defendant had adequately pleaded for attorneys’ fees where (1) his prayer listed attorneys’ fees without citing any claim or other theory of entitlement therein or anywhere else in his answer; (2) the plaintiff pled causes of action for breach of contract, referencing the contract at issue, declaratory judgment, and sought fees under Chapters 37 and 38; (3) plaintiff never specially excepted to defendant’s arguably deficient pleading and the court, therefore, construed the pleadings liberally in favor of the defendant; and (4) defendant first mentioned a theory for entitlement in post-judgment motions. See No. 05-18-00288-CV, 2019 Tex. App. LEXIS 1227, at *1 (Tex. App.—Dallas Feb. 20, 2019, no pet.) (mem. op.) (citing Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd., 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.)). See also Vinson
Corrosion Control Servs. v. Walker Cty., No. 10-17-00337-CV, 2018 Tex. App. LEXIS 7833, at *2-3 (Tex. App.—Waco Sep. 26, 2018, no pet.) (mem. op.) (finding defendant’s pleading sufficient to support attorneys’ fees award where prayer in defendant’s answer included “generic” request for attorneys’ fees in a declaratory judgment case and plaintiff did not specially except to the vague pleading).

From this line of cases, courts will look not only to the applicant’s pleading, but to the opposing party’s pleading. Thus, at a minimum in a breach of contract case, one of the parties must cite the contract at issue and the prevailing party must pray for attorneys’ fees. Additionally, courts will look to whether the opposing party attempted to clarify the applicant’s vague, general pleading to force specificity.

However, the courts seem disposed to grasping any pleaded straw to allow for recovery of attorneys’ fees. Pleading an incorrect or inapplicable theory or statute does not preclude an award, nor does pleading for fees under one cause of action upon which the applicant does not prevail, but not another that authorizes fees upon which the applicant does prevail. See HMT Tank Servs. LLC v. Am. Tank & Vessel, Inc., 565 S.W.3d 799, 812-14 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Appellants contend that ATV cannot be awarded any fees because it requested fees only under rule 91a, and ATV is not a prevailing party under that rule. We disagree. Although ATV specifically sought attorney’s fees under rule 91a, it also included a more general request for attorney's fees in its pleadings, which is sufficient to invoke the potential for attorney's fees under the UDJA. See … Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 575 (Tex. App.—Houston [14th Dist.] 1983), rev’d in part on other grounds, 704 S.W.2d 742 (Tex. 1986) (“Moreover, pleading an incorrect or inapplicable theory or statute, as was done here, does not preclude an award.”).

Id. at 813.

Similarly, in Granbury Hospitality, Inc. v. State Bank of Texas, the Dallas Court of Appeals noted that the plaintiff had requested attorneys’ fees in both its petition and motion for summary judgment without specifying a legal basis and, “because the [plaintiff] did not specify a legal basis for fee recovery, it may recover its fees on any available legal basis,” including either the Chapter 38 or the contractual provision, the latter of which required no presentment. See No. 05-16-01509-CV, 2018 Tex. App. LEXIS 6558, at *16-17 (App.—Dallas Aug. 20, 2018, pet. denied) (mem. op.). See also Anani v. Abuzaid, No. 05-16-01364-CV, 2018 Tex. App. LEXIS 4141, at *25-26 (Tex. App.—Dallas June 7, 2018, no pet. h.) (mem. op.) (plaintiff adequately pleaded the right to recover fees where he pleaded that “as a result of the defendants’ breaches of contract, he is entitled to recover reasonable attorney’s fees under Chapter 38”).

Like a line on a football field, you should not trip over this threshold. Pleading presentment is unlikely to be a matter in controversy. However, if presentment is contested, a claimant must

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7 Six weeks after the opinion was delivered and one week after the Dallas Court of Appeals ordered the appellee respond to appellant’s motion for rehearing, appellee filed a notice of suggestion of bankruptcy and the case has been abated since then.
request and obtain a jury finding on the issue. In *Svoboda v. Thai*, an attorneys’ fees award was reversed and rendered for failure to obtain jury finding on presentment when the issue was not submitted in a question to the jury after defendant’s objection at the charge conference to the omission and presentment was not proven as a matter of law. See No. 01-17-00584-CV, 2019 Tex. App. LEXIS 2600, at *9-10 (Tex. App.—Houston [1st Dist.] Apr. 2, 2019, no pet. h.) (mem. op.). *Svoboda* recognizes that presentment is generally an issue of fact that must be submitted to the jury unless conclusively proven. See id.

(i.) PRACTICE POINTER: Pleading

Always identify the contract at issue, include a paragraph asserting your right to recover attorneys’ fees under as many grounds as possible (contract, Chapter 38, other authorizing statutes), and identify attorneys fees for all stages of litigation in your prayer. Considering referencing to and attaching to your petition your evidence of presentment.

(ii.) PRACTICE POINTER: Proving

If contested, you must get a jury question on presentment.

(b) Condition Precedent

Presentment has been described as a condition precedent. See *Beauty Elite*, 2008 Tex. App. LEXIS 1918, at *14. See also *Pike v. Tex. EMC Mgmt., LLC*, No. 10-14-00274-CV, 2017 Tex. App. LEXIS 5217, at *55-57 (App.—Waco May 31, 2017, pet. reinstated) (mem. op.). As such, one would assume that the plaintiff could simply plead that all conditions precedent have been fulfilled and that would satisfy the pleading requirement. See TEX. R. CIV. P. 54. In *Beauty Elite*, the claimant Palchick was more explicit, pleading in his Third Amended Petition:

Pursuant to Texas Civil Practice and Remedies Code Sections 38.001 and 38.002, Plaintiff would show that he may recover his reasonable and necessary attorney’s fees incurred in presenting and prosecuting the within suit. To wit, the claim is one for breach of oral contract as provided at Section 38.001(8) or services rendered or labor performed pursuant to Section 38.001(1) and (2). Timely demand for payment was made and refused as required by Section 38.002.

*Beauty Elite*, 2008 Tex. App. LEXIS 1918, at *14-15. The Fourteenth Court of Appeals found this pleading satisfactory. However, to be absolutely certain, the claimant should add a clause, such as the following, to the last sentence: “Timely demand for payment was made and refused as required by Section 38.002, including [description of various presentments].”

(i.) PRACTICE POINTER: Always Plead Conditions Precedent

Always plead conditions precedent have been satisfied, even if you plead presentment more specifically as in *Beauty Elite*. 
(c) “Condition Precedents” Require Specific Denial

As a condition precedent, Rule 54 requires the defendant to specifically deny each condition precedent the defendant intends to contest. If the plaintiff properly pleads and the defendant does not specifically deny presentment, the plaintiff need not put on evidence of presentment. See Pike, 2017 Tex. App. LEXIS 5217, at *55-57 (explaining that while the debtors/defendants pleaded that “all conditions precedent necessary . . . have not occurred,” this language did not satisfy the specific denial requirement of Rule 54 and the debtors/defendants had waived their right to complain on appeal); Beauty Elite, 2008 Tex. App. LEXIS 1918, at *15 (citing Landscape Design & Constr., Inc. v. Harold Thomas Excavating, Inc., 604 S.W.2d 374, 378 (Tex. App.—Dallas 1980, writ ref’d n.r.e.) (rejecting defendant’s argument there was no evidence of presentment because it was not raised in the trial court)); Trout v. Patterson, No. B14-93-00149-CV, 1994 Tex. App. LEXIS 981, at *6 (Tex. App.—Houston [14th Dist.] April 28, 1994, writ denied) (same). So, if you intend to contest presentment, you had better plead a specific denial, i.e. “defendant specifically denies that presentment occurred.”

However, a plaintiff can fail to enforce Rule 54’s requirement to plead a specific denial to presentment or all conditions precedent. See Hamdan v. Hamdan, No. 14-16-00548-CV, 2017 Tex. App. LEXIS 10168 at *20-34 (Tex. App.—Houston [14th Dist.] Oct. 31, 2017, no pet.) (mem. op.). In that case, the plaintiff waived the defendant’s waiver in many ways. The plaintiff properly pleaded presentment and all conditions precedent. In his answer, the defendant pleaded neither an affirmative defense nor specific denial under Rule 54. However, when the defendant raised an issue about presentment at trial, the plaintiff failed to raise Rule 54 during trial, thereby failing to preserve error for his complaint regarding the defendant’s pleading deficiency. Further, plaintiff failed to preserve error of defendant failing to raise presentment issue until post-trial submission of fees by not making the complaint during trial. In fact, the plaintiff first raised the Rule 54 issue on appeal, which the appellate court found was too late. Next, the plaintiff waived the defendant’s pleading deficiency by allowing trial by consent. After the defendant raised the presentment issue, the plaintiff responded by submitting evidence on the issue of presentment to the trial court. Once the issue was before the trial court, the plaintiff bore the burden of proof. Indeed, the appellate court rejected the plaintiff’s argument that, under these circumstances, failure to present was an affirmative defense upon which the defendant had the burden of proof. Given that the trial court impliedly found no presentment by refusing to award attorneys’ fees, plaintiff on appeal had to prove conclusively that he presented his claim. However, the appellate court found that plaintiff failed to prove as a matter of law that he presented the claim.

(d) No Particular Form of Presentment Required

Chapter 38 does not specify the form of presentment. In keeping with section 38.005, which provides that the statute is to be liberally construed to promote its underlying purpose, almost anything will do. Of course, a pre-suit demand letter is the classic means of presentment, especially when the defendant does not attempt to explain why it is inadequate. See Granbury Hospitality, 2018 Tex. App. LEXIS 6558, at *15-16. The courts have repeatedly held that no particular form of presentment is required and ruled that presentment may be oral or written, including by e-mail, in conversations, in invoices with a payment in thirty days provisions, during depositions, in requests for admissions, and more. See Sacks, 481 S.W.3d at 251 (citing Gordon v. Leasman, 365
S.W.3d 109, 116 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (finding that an oral request for performance is sufficient to meet the presentment requirement) and Belew v. Rector, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.) (stating that presentment may be done orally or in writing and may be accomplished with requests for admission); Beauty Élite, 2008 Tex. App. LEXIS 1918, at *17-18 (finding a series of e-mails satisfied the presentment requirement); Dror, 2013 Tex. App. LEXIS 12090, at *22 (finding an e-mail from counsel satisfied presentment); McDowell v. Bier, No. 2-09-231-CV, 2010 Tex. App. LEXIS 2546, at *17-18 (Tex. App.—Fort Worth 2010, no pet.) (mem. op.) (applying a liberal construction and finding that “multiple conversations inquiring about the money owed, one in which McDowell indicated that he was attempting to refinance a house to get cash and another regarding McDowell selling a house that Bier had built for him” satisfied the presentment requirement (emphasis added)); Carter v. Flowers, No. 02-10-00226-CV, 2011 Tex. App. LEXIS 7829, at *14-15 n.26 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.) (citing Marifarms Oil & Gas, Inc. v. Westhoff, 802 S.W.2d 123, 127 (Tex. App.—Fort Worth 1991, no writ) (holding that evidence of presentment was sufficient where the evidence showed that demand had been made in a deposition taken more than thirty days prior to trial)); Gordon v. Leasman, 365 S.W.3d 109, 116 (citing numerous cases and holding that nonpayment of a bill or invoice for thirty days satisfies the presentment requirement and for request for payment in full over phone constituted presentment requirement); Note Inv. Group, Inc. v. Assocs. First Capital Corp., 476 S.W.3d 463, 486 (Tex. App.—Beaumont 2015, no pet.) (citing Genisco, Inc. v. Transformaciones Metalurgicas Especiales, S.A., 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dismissed) (“In that case, the invoices themselves constituted evidence of a request for payment by the plaintiff . . . .” (emphasis added)); cf. Sacks, 481 S.W.3d at 252-53 (a ledger intended for internal use and given to a patient/customer to show the status of her account is not a bill or invoice and, therefore, does not constitute presentment).

Although the courts are very lenient in considering what constitutes presentment, requesting to talk about claims or discussing settlement is one of the few instances (along with the above discussed providing a copy of an account ledger) that does not constitute presentment:

This court has held that merely engaging in “discussions” about settling claims was no evidence of presentment, let alone conclusive evidence of presentment. See Border Gateway, L.L.C. v. Gomez, No. 14-10-01266-CV, 2011 Tex. App. LEXIS 7589, 2011 WL 4361485, at *9 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, no pet.) (mem. op.) (reversing award of attorney’s fees when the parties “made repeated efforts to negotiate the terms of settlement”; holding that “participation in settlement discussions is insufficient to show that a party presented a claim”). Evidence that the parties merely discussed or talked about settling a dispute is insufficient to prove presentment because “it does not satisfy the purpose of the presentment requirement: to provide the defendant with ‘the opportunity, by undertaking specific action, to avoid paying attorney’s fees.’” Genender, 451 S.W.3d at 927 (quoting Belew v. Rector, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.)).

See Hamdan, 2017 Tex. App. LEXIS 10168 at *35. Due to the procedural history of the case (an implied finding of fact that the plaintiff had not presented his case), the plaintiff in Hamdan had to prove presentment as a matter of law on appeal. In that decision, the Houston Fourteenth Court
of Appeals contrasted “talks” and “settlement discussions” with proof that the plaintiff sent a demand letter, which conclusively proved presentment as a matter of law citing numerous cases recognizing this proposition. *See id. at *35-37. See also Skyline Commercial, Inc. v. ISC Acquisition Corp., No. 05-17-00028-CV, 2018 Tex. App. LEXIS 6764, at *27 (Tex. App.—Dallas Aug. 23, 2018) (mem. op.)* (finding the claimant submitted sufficient evidence of presentment where plaintiff proved (a) it had spoken to the defendant about the bills, sent invoices, and exchanged e-mails with the defendant, including emails confirming the defendant had the invoices; and (b) its counsel had sent a demand letter

**e) Pleadings are Not Presentment**

However, one thing is clear, a petition, cross-claim, or counterclaim does not constitute presentment:

Neither the filing of a suit nor the allegation of a demand in the pleadings can, alone, constitute a presentment of a claim or a demand that the claim be paid. *Helping Hands Home Care, Inc.*, 393 S.W.3d at 516; *Panizo*, 938 S.W.2d at 168 (“[T]he act of filing suit is not by itself a demand within the terms of the statute.”). An oral request for performance is sufficient to meet the presentment requirement. . . . *See also Belew v. Rector*, 202 S.W.3d 549, 857 (Tex. App.—Eastland 2006, no pet.) (stating that presentment may be done orally or in writing and may be accomplished with requests for admission, but that “[m]erely filing a breach of contract claim, however, is insufficient”).

*Sacks*, 481 S.W.3d at 251. In *Sacks*, Dr. Hall asserted a breach of contract counterclaim. However, other than the pleading itself, he submitted no proof of presentment. The court concluded: “Dr. Hall’s assertion of his breach of contract counterclaim, by itself, is insufficient to constitute presentment.” *Id.* at 253. As a result, the First Court of Appeals modified the judgment in Dr. Hall’s favor by deleting the attorneys’ fees.

The *Sacks* opinion also stands for the proposition that (1) a refusal to continue to treat/work does not qualify as presentment and (2) a ledger intended for internal use and given to a patient/customer to show the status of her account does not constitute presentment. *See id.* at 251-53.

**f) Elements of Presentment: Notice, Amount, and Time**

In *Sacks*, the First Court of Appeals also considered the minimum requirements for a presentment and explained:

“The word ‘present’ has been defined to mean a demand or request for payment.” *Canine, Inc. v. Golla*, 380 S.W.3d 189, 193 (Tex. App.—Dallas 2012, pet. denied); *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 904 n.3 (Tex. App.—Austin 1991, no writ) (“Apparently, the supreme court has construed [presentment] to mean simply a demand or request for payment. In all events, the elements of presentment in § 38.002 must include at a minimum a demand or request for payment, irrespective of what else it might include.”).
“[A]ll that is necessary is that a party show that its assertion of a debt or claim and a request for compliance was made to the opposing party, and the opposing party refused to pay the claim.” Gordon, 365 S.W.3d at 116 (quoting Standard Constructors, Inc. v. Chevron Chem. Co., 101 S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)); see Carr, 744 S.W.2d at 271 (holding that letter notifying opposing party of termination of contract and requesting release of letter of credit constituted proper presentment because “[t]he elements of notice, time and proof of amount are all present”).

Id. at 250-51. Thus, any conversation or writing must merely place the debtor on notice of the claim, state the amount sought, and allow for the passage of thirty days. It is important to note that many demand letters or invoices provide for payment in thirty days. However, the statute and other cases recognize that the mere passage of thirty days is sufficient without the term being expressly stated. See Gordon, 365 S.W.3d at 116. Conversely, a demand letter that (1) stated a single amount inclusive of the amount of the claim, fees incurred to date, and an allowance for future fees and (2) provided for revocation if not paid in 14 (not the statutory 30) days was held not to comport with the requirements of section 38.002 and, as such was found to raise a fact question as to whether the claim had been presented. Svoboda v. Thai, No. 01-17-00584-CV, 2019 Tex. App. LEXIS 2600, at *15-16 (Tex. App.—Houston [1st Dist.] Apr. 2, 2019, no pet. h.) (mem. op.) (reversing an attorneys’ fees award for failure to prove presentment).

(i.) PRACTICE POINTER: Requirements of Presentment Demand Letter

Be sure that the presentment states the amount of the claim and attorneys’ fees separately and provides the statutorily required 30 days to respond.

(g) Timing of Presentment

Presentment may be made either before or after filing suit. See McDowell, 2010 Tex. App. LEXIS 2546, at *16-18. However, presentment must occur thirty days prior to trial or judgment, depending on the line of cases you choose to follow. See Carter, 2011 Tex. App. LEXIS 7829 at *14-15 n.26 (recognizing the split in authority and citing cases for both thirty days prior to trial and thirty days prior to judgment); McDowell, 2010 Tex. App. LEXIS 2546, at *16-18 (thirty days prior to judgment).

(h) Tender

Based on the statutory language, “tender” is another absolute defense to attorneys’ fees claims under Chapter 38. However, claimants and defendants need to be aware of the definition of tender as they may wish to argue that an offer was or was not technically a tender. In Crisp Analytical Lab, L.L.C. v. Jakalam Properties, Ltd., the Dallas Court of Appeals addressed this issue while considering a related issue. See 422 S.W.3d 85 (Tex. App.—Dallas 2014, pet. denied). There, Jakalam Properties made a demand for reimbursement of $9,977.79 in costs associated with a building project. In return, Crisp Analytical responded with a letter explaining its analysis of the damages and why those were less than the requested amount, a release form, and a $3,500 check, which it calculated as the amount of costs owed. Crisp Analytic contended that this constituted a “tender.” At trial, Jakalam Properties asked for $9,478.44, but the jury awarded only $513 in
damages and $49,500 in attorneys’ fees. The Dallas Court of Appeals recited the general rules regarding tender: (1) it is an unconditional offer by a debtor to pay a sum of money not less than the amount due on the obligation; (2) it generally must include an offer to pay or grant everything to which the creditor is entitled and any lesser sum is ineffectual; and (3) it does not allow for the possibility of conditional offers. Id. at 91-92. Another case sets the bar even higher saying that “a valid and legal tender of money consists of the actual production of the funds and offer to pay the debt involved.” See Cactus Canyon Quarries of Tex. v. Williams, No. 03-98-00023-CV, 1999 Tex. App. LEXIS 4300, at *6 (Tex. App.—Austin June 10, 1999, no writ) (emphasis added) (citing Baucum v. Great Am. Ins. Co., 370 S.W.2d 863, 866 (Tex. 1963)). Given these rules, the Dallas Court of Appeals found that Crisp Analytical’s offer was not a tender as it was for less than demanded and was conditioned on execution of a release. Id. at 91-92.

(i.) PRACTICE POINTER (Claimant)

Given the Dallas Court of Appeals analysis, a claimant may argue any offer less than what was fully demanded (even if far less is sought or awarded at trial) does not constitute a tender. Further, if the debtor/defendant has the temerity to simultaneously request a release, a claimant can argue there was no tender.

(ii.) PRACTICE POINTER (Debtor/Defendant)

Given the rules cited by the Dallas Court of Appeals, a debtor/defendant should argue that the “amount due on the obligation” and “everything to which the creditor is entitled” means what the finder of fact awards. Thus, Crisp Analytical’s offer should have been more than an adequate tender. We think that Note Investors makes more sense on this point. See Note Inv. Group, 476 S.W.3d at 493 (while recognizing that a partial tender will not prevent an award of attorneys’ fees, the court found that the debtor/defendant made a valid tender where the amount tendered exceeded the award even though the tendered amount was less than the amount demanded).

If you wish to assert tender as a defense, plead and prove it. If necessary, request a jury issue on whether your tender was adequate.

Further, given the state’s public policy of encouraging settlements and considering that virtually every settlement comes with a release, courts should not consider executing a release to be a condition. However, you will be swimming upstream. So, best to make the request for a release in a separate document.

(i) When Fees Begin to Accrue

If presentment can be made as late as thirty days prior to judgment, what attorneys’ fees can be claimed? Cases repeatedly recognize that the purpose of presentment is to allow the debtor/defendant an opportunity to pay a claim within thirty days after notice of the claim without incurring an obligation for attorneys’ fees. See McDowell, 2010 Tex. App. LEXIS 2546, at *16; Dror, 2013 Tex. App. LEXIS 12090, at *20 (citing Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 818 (Tex. 2006)); Sacks, 481 S.W.3d at 250. Logically, if the purpose of the statute is to give the debtor/defendant time to resolve the dispute without incurring attorneys’ fees, a
claimant should not be able to begin to accrue attorneys’ fees until after the expiration of the 30 day period.

However, in a suit for breach of a contract, an appellate court rejected a defendant’s argument that the claimant was not entitled to fees incurred before the date of presentment where the record showed presentment occurred during the pendency of the case, but more than thirty days before the trial court rendered judgment. There, the court held that section 38.002 does not limit the award to fees incurred after the date of presentment. Helms v. Swansen, No. 12-14-00280-CV, 2016 Tex. App. LEXIS 4540, at *24 (Tex. App.—Tyler April 29, 2016, pet. denied) (mem. op.).

In a case concerning the Texas Theft Liability Act (“TTLA”), which provides for attorneys’ fees to the prevailing party under section 134.005(b) of the Texas Civil Practice & Remedies Code, the plaintiff argued that although the defendants prevailed, they were not entitled to pre-suit attorneys’ fees. See Brinson Benefits, Inc. v. Hooper, 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.). While the Dallas Court of Appeals deferred the issue due to lack of record citation and briefing, it noted: “Under a different attorney’s fee statute, a prior panel of this Court concluded on the facts of that case and the text of that statute that pre-suit attorney’s fees were recoverable.” Id. at 646 n.7. That case, American Heritage Capital, LP v. Gonzalez, dealt with the Texas Citizens Participation Act, which provides that reasonable and necessary attorneys’ fees incurred in defending against a legal action shall be awarded to the moving party (which would usually be the defendant) as justice and equity may require upon the granting of a motion to dismiss. Similarly, the TTLA provides that reasonable and necessary attorneys’ fees shall be awarded to the prevailing party. Thus, the Dallas Court of Appeals’ explanation in American Heritage Capital, LP gives ample grounds to recover pre-suit (and, by reasonable extrapolation, pre-presentment) attorneys’ fees:

Chapter 27 defines “legal action” as “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” So the term “legal action” is not limited to formal judicial pleadings and proceedings—it also includes “cause[s] of action.” Accordingly, Alan can recover his pre-joinder attorneys’ fees if he incurred them to defend against AHC’s “cause of action.” The statute does not define “cause of action,” but the generally accepted meaning of that term is “the fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.” A “cause of action” generally arises before the formal filing of suit on that cause of action. Can a person “defend” against a cause of action that has arisen but not yet resulted in the filing of a lawsuit? We conclude that the answer is yes. To defend means to “deny, contest, or oppose (an allegation or claim).” In order to properly defend, a lawyer must adequately prepare by investigation, research, and drafting of pleadings. If a lawsuit is anticipated and, as in this case, comes to fruition, it is both reasonable and necessary to prepare a defense in advance. It would be a singularly inexperienced view to assume that legal work actually commences when a formal defense is filed in a lawsuit rather than well before the filing occurs. Once a cause of action has arisen and resulted in a claim or demand, even one made pre-suit, securing legal services to oppose or contest the cause of action is a natural choice and a reasonable course of

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8 Brinson made this as a segregation argument.
action. Delay and procrastination may lead to unpleasant consequences. If the legislature had intended to limit the recovery of attorneys’ fees to fees incurred after the filing of suit against the movant, it presumably would have limited its definition of “legal action” to formal legal proceedings or otherwise excluded “causes of action” from the scope of section 27.009(a)(1). For these reasons, we conclude that section 27.009(a)(1) permits a successful movant to recover attorneys’ fees incurred in the defense of a cause of action even if the fees were incurred before the movant was actually sued.

Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 879-80 (Tex. App.—Dallas 2014, no pet.). While Chapter 38 uses the term “claim” and the Dallas Court of Appeals focused on the phrase “cause of action,” the reasoning would seem to apply to both.

(j) Excessive Demand

A claimant who presents an excessive demand to a debtor/defendant is not entitled to attorneys’ fees for subsequent litigation required to recover the debt, making it another absolute defense to a Chapter 38 attorneys’ fees claim. See Beauty Elite, 2008 Tex. App. LEXIS 1918, at *12 (citing Findlay v. Cave, 611 S.W.2d 57, 58 (Tex. 1981); Dror, 2013 Tex. App. LEXIS 12090, at *21; State Farm Lloyds v. Fuentes, No. 14-14-00824-CV, 2016 Tex. App. LEXIS 3611, at *17-18 (Tex. App.—Houston [14th Dist.] Apr. 7, 2016)(mem. op.), aff’d in part, rev’d in part 549 S.W.3d 585 (Tex. 2018).9 However, the threshold for excessive demands is quite a bit higher than what most defendants would assume.

(i.) Application

In Beauty Elite, the Fourteenth Court of Appeals explained:

In Findlay, the Texas Supreme Court instructed that the prohibition on recovery of attorney’s fees following an excessive demand applies only when (1) the claim is for a liquidated debt; and (2) the creditor refused the debtor’s tender of the liquidated amount actually due or indicated that such a tender would be refused. Findlay, 611 S.W.2d at 58; see also Hernandez v. Lautensack, 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied) (rule is limited to situations where the creditor refuses a tender or indicates he will refuse a tender of what is actually owed); Tuthill v. Sw. Pub. Serv. Co., 614 S.W.2d 205, 212 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (demand is not excessive unless the creditor wrongfully demands more than the amount due and creditor refuses or indicates he will refuse tender of the amount actually due).

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9 With respect to the excessive demand issue, the Texas Supreme Court affirmed and “found no fault in the court of appeals’ analysis.” Fuentes, 549 S.W.3d 587-88. The Texas Supreme Court also noted that:

Generally, a “creditor who makes an excessive demand upon a debtor is not entitled to attorney’s fees for subsequent litigation required to recover the debt.” Findlay v. Cave, 611 S.W.2d 57, 58 (Tex. 1981) (citations omitted). But we have never addressed whether the excessive-demand defense applies when insureds make an excessive demand on their insurer.

Id. at 588.
An award of an amount less than the demand is not dispositive. *See Findlay*, 611 S.W.2d at 58; *Alford v. Johnston*, 224 S.W.3d 291, 298 (Tex. App.—El Paso 2005, pet. denied) (absent additional showing of unreasonableness or bad faith, award of attorney’s fees is not precluded solely because the amount of damages awarded is less than the amount sought); *Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307, 318 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (“The dispositive question in determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith”).

*Beauty Elite*, 2008 Tex. App. LEXIS 1918, at *12-14. *See also Fuentes*, 2016 Tex. App. LEXIS 3611, at *18 (requiring the debtor/defendant prove that (1) the claimant acted unreasonably or in bad faith in making the demand; and (2) refused tender of the amount actually due or clearly indicated to the debtor/defendant that such tender would be refused, i.e. the tender is excused as the claimant has clearly indicated that he is unwilling to accept what is due in discharge of the debt).

Thus, in order for the affirmative defense of excessiveness to apply, there must be a liquidated debt, a demand exceeding the liquidated debt that was unreasonable or made in bad faith, a tender by the debtor/defendant of the amount truly owed, and a rejection (expressed or implied) of the tendered amount.\(^{10}\)

**(ii.) Debtor/Defendant Must Plead and Prove the Affirmative Defense**


**(iii.) Debtor/Defendant Must Obtain a Finding of Fact on Excessiveness**

Additionally, the debtor/defendant must request and obtain findings of fact regarding the essential elements (including unreasonableness or bad faith) of excessive demand. *See Beauty Elite* 2008 Tex. App. LEXIS 1918, at *18 (finding that the debtor/defendant failed to plead excessive demand as an affirmative defense in his live trial pleadings, and that he failed to obtain findings regarding unreasonableness or bad faith, the Fourteenth Court of Appeals overruled his appellate point on excessiveness). *See also Dror*, 2013 Tex. App. LEXIS 12090, at *21-22 (finding the debtors/defendants failed to obtain a fact finding on excessiveness and further rejecting the debtors’/defendants’ argument that they had proven excessiveness as a matter of law).

\(^{10}\) *Findlay v. Cave* is the root of this doctrine and it required a liquidated debt. *See 611 S.W.2d at 58*. Other cases seem to have expanded the doctrine to apply to unliquidated debts, but, in doing so, given the claimant more leeway in the demand.
(iv.) Factors Determining Excessiveness

A demand is not excessive simply because it is greater than the amount eventually awarded. See Fuentes, 2016 Tex. App. LEXIS 3611, at *18 (citing Findlay, 611 S.W.2d at 58 (noting an award exceeding the demanded amount “cannot be the only criterion for determination, especially where the amount due is unliquidated”)). For instance, in State Farm Lloyds v. Fuentes, the claimants’ demand was $233,000, almost double the policy limits of $133,000 and almost four times the damages requested at trial. To add insult to injury, the claimants in their demand letter sought $122,000 in fees when they had proof of only $240 in attorneys’ fees expended through the date of the demand letter. However, the Fourteenth Court of Appeals determined this was all of no moment as State Farm failed to present evidence of a tender, much less that the claimants would have refused the actual amount due. See also KKR Rv’s, LLC v. Andersen, No. 01-18-00178-CV, 2018 Tex. App. LEXIS 9901, at *10 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet.) (mem. op.) (recognizing that, “as a matter of law, a demand is not excessive merely because it is greater than the amount sought from or awarded by the factfinder” and specifically citing as an example a case in which the demand for $125,000 was found to be not excessive even though jury only awarded $1,000 on contract claim).

Further, the Fourteenth Court of Appeals rejected State Farm’s futility-of-tender argument. The court held that: “To meet the futility-of-tender element of excessive demand, the evidence must clearly indicate that the creditor would refuse tender by the debtor of any amount less than the excessive demand.” Id. at *20. The court of appeals then parsed the language of several cases, comparing and contrasting absolute or unqualified demands that support the futility-of-tender defense11 from the claimants’ more qualified demands that indicated a willingness to compromise,12 which it found nullified the futility-of-tender defense.

As mentioned earlier, State Farm Lloyds v. Fuentes was affirmed in part, vacated in part, and remanded for further proceedings by the Texas Supreme Court. In doing so, the Court found no fault in the Houston Fourteenth Court of Appeals’ analysis with respect to the excessive demand issue. Although not successful, State Farm’s briefing on the excessive demand issue is helpful to the extent it lists the factors that courts have considered in analyzing the excessive demand defense, particularly in insurance coverage cases. These include:


- the difference between the amount demanded and the amount sought at trial. See Mossler v. Nouri, No. 03-08-00476-CV, 2010 WL 2133940, at *2 (Tex. App.—Austin May 27, 2010, pet. denied) (mem. op.).

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11 Absolute or unqualified demands typically include language requiring the debtor/defendant to “pay in full within thirty days or suit will be filed” or admonishing the debtor/defendant that “no less than the complete amount due will be accepted.”

12 The claimants’ demands lacked words like “full” and “complete”; instead, stating that “the demand was made in the spirit of compromise” and indicating that counsel “hope[d]” the demand would be viewed in good faith and lead to an expeditious resolution on amicable terms.


• any clear indication tender was, or would have been, refused by the plaintiff, or that negotiation would have been futile. See Mossler, 2010 WL 2133940, at *8; Aero DFW, 2007 WL 704911, at *4; Hernandez v. Lautensack, 201 S.W.3d 771, 778 (Tex. App.—Fort Worth 2006, pet. denied); Tuthill, 614 S.W.2d at 212.

• any dispute, at the time of the demand, as to the meaning or applicability of the policy. See Smallwood, 242 S.W. at 505; Franklin Life Ins. Co. v. Greer, 219 S.W.2d 137, 144 (Tex. Civ. App.—Texarkana 1949), aff’d in relevant part, 221 S.W.2d 857 (1949).


See State Farm’s Brief on the Merits at 29-31.

(v.) Demand Exceeding Award is Not Necessarily Excessive

The mere fact that the presented demand exceeds the amount awarded does not necessarily establish excessiveness, but it may be some evidence thereof.

A demand is not excessive simply because it is greater than the amount eventually awarded by the fact finder. Findlay, 611 S.W.2d at 58; Panizo v. Young Men’s Christian Ass’n of Greater Hous. Area, 938 S.W.2d 163, 169 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (unliquidated demand of $125,000 not excessive even though jury awarded only $1,000).
However, “a claim for an amount appreciably greater than that which a jury later
determines is actually due . . . may indeed be some evidence of an excessive demand.”
Findlay, 611 S.W.2d at 58. And “it may be very persuasive evidence” when a claim is
liquidated. Id.; Tonkin v. Amador, No. 01-07-00496-CV, 2009 Tex. App. LEXIS 3554,
2009 WL 1424724, at *5 (Tex. App.—Houston [1st Dist.] May 21, 2009, no pet.); see also
BLACK’S LAW DICTIONARY (8th ed. 2004) (“liquidated debt” is “[a] debt whose
amount has been determined by agreement of the parties or by operation of law”).
Nevertheless, “it cannot be the only criterion for determination, especially where the
amount due is unliquidated.” Findlay, 611 S.W.2d at 58 (“Certainly one can conceive of
circumstances in which a demand for an unliquidated sum would have to be characterized
as excessive, and attorney’s fees denied.”); Outdoor Sys., Inc. v. BBE, L.L.C., 105 S.W.3d
66, 73 (Tex. App.—Eastland 2003, pet. denied); Panizo, 938 S.W.2d at 169 (unliquidated
demand not excessive).

2016, pet. granted, judgm’t vacated w.r.m.). As stated in the previous section, in order to prove
excessiveness, the debtor/defendant must prove a demand exceeding the debt was unreasonable or
made in bad faith, a tender by the debtor/defendant of the amount truly owed, and a rejection
(expressed or implied) of the tendered amount.

(k) Additional PRACTICE POINTERS: On Presentment (Claimants)

Given that a failure to present results in preclusion of a claimant’s attorneys’ fees claim, a claimant
should be absolutely certain that an adequate presentment has occurred, is pleaded, and proof of
the presentment and the failure to tender is proffered at trial.

Upon receiving a case for prosecution, you should check your client’s file (hard copy and
electronic) for clear evidence of presentment. If you cannot find any (or you have any concerns
about it), prepare a simple demand letter in which you raise the claim, state the amount at issue,
request payment, offer to consider any offsets or alternative calculation of damages the recipient
might assert, indicate a willingness to compromise (even consider soliciting a counter-offer), give
thirty days to pay, and explain that thereafter you will seek attorneys’ fees regardless of when
incurred. Optimally, you should present prior to filing a lawsuit; however, you can present anytime
prior to thirty days before trial (or judgment, according to certain cases.) You should send this
demand letter by some means allowing verification of receipt to avoid an argument later.

If you get into litigation, you will need to plead (generally as a condition precedent and specifically
any formal presentment made) and prove presentment and lack of tender. If the defendant contests
presentment with specific denial, then much of this should be possible to prove through requests
for admissions. A simple set of requests should attach a copy of the presentment (or describe it if
oral) and seek admissions that the document is true and correct, that it was received, and that it
constitutes presentment under § 38.002. If the debtor/defendant denies the requests, issue a new
presentment and send new requests. However, if the defendant is recalcitrant or if there is a real
issue, develop it through other discovery and depositions.
(l) Additional PRACTICE POINTERS: On Presentment and Excessive Demand (Debtor/Defendant)

Conversely, defendants are in a tactical quandary. If the plaintiff has not pleaded all conditions precedent generally or presentment specifically, are you willing to risk waiver of the defense by saying nothing? If you object (specific denial), the claimant will likely immediately realize its error and make a presentment. Likewise, if the claimant has not properly pleaded presentment but puts on evidence of presentment (either in summary judgment proof or at trial), you must object to avoid trial by consent.

If you manage to get through trial without the plaintiff pleading or proving presentment but the court is willing to follow the line of cases allowing presentment thirty days prior to judgment, the claimant need only request a thirty day delay in the entry of the judgment and make a presentment. (In which case, if you are the claimant, you need to be sure the presentment gets into the record, both a pleading and the proof.)

On the other hand, in the ultimate laying behind the log strategy (of which courts are so fond), are you willing to allow entry of the judgment and raise the issue in post-judgment briefing? If you do so, the claimant could request withdrawal of the judgment, an abatement of thirty days, and subsequently move for judgment. If you seek a pre-trial ruling (like a Rule 104 motion) establishing the deadline as thirty days prior to trial, the claimant could request a continuance. A competent claimant should always be able to satisfy its presentment requirement.

Except in unusual circumstance, the best a debtor/defendant may be able to do is to use the lack of presentment as leverage to settle without the need to pay attorneys’ fees. Alternatively, nothing prevents a defendant from arguing that fees incurred prior to presentment are unreasonable.

Likewise, assuming you do not have an absolute liability defense on the underlying claim, consider making a tender for what you calculate is owed (or a reasonable settlement offer) within thirty days. Like the presentment, make it in writing and send it by some receipt verifiable means. If the claimant does not engage in meaningful negotiations, you have effectively proven that your tender was rejected (thereby avoiding the need to rely on the futility-of-tender defense). If you cannot make a tender within thirty days, ask for additional time and a stand down during the pendency. If need be, grant a tolling agreement to stop the statute of limitations from running. If the case has already been filed, ask for an abatement of proceedings and discovery until you can make a tender. If your tender is dependent upon ascertaining certain facts, advise the claimant’s counsel and request that future proceedings be limited to informal (or formal) discovery to determine those facts. These may not be absolute defenses to an attorneys’ fees claim, but they certainly set a guideline for fees incurred by the claimant until you make a tender. And, if your tender is anywhere close to what is awarded, you have established a factual argument for limiting post-tender fees. Of course, proving your tender has consequences that need to be evaluated before you take this course of action. Do you want the jury to know you were willing to pay the claimant, much less knowing how much? Will the jury ignore the other half of your tender letter by which you thoroughly and reasonably explain your lack of liability?
Then prove up your tender and negotiations with discovery. Like with the claimant proving up his presentment, you should prepare set of requests for admission. A simple set of requests should attach a copy of the tender (or describe it if oral) and seek admissions that the document is true and correct, that it was received, that it constitutes presentment under section 38.002, and that the claimant did not respond (or whatever the response was, if it is helpful). You should develop the facts surrounding tender and negotiations during discovery.

If you are going to contend that the demand was excessive, do not merely assume that everyone will find the demand as obnoxious as your client does. Be sure to plead excessiveness as an affirmative defense. If you do not make a tender that evokes an outright rejection, consider also pleading futility-of-tender as a separate defense. You must then develop this defense through discovery. Ultimately, you must obtain some fact finding establishing excessiveness, futility, or both, although, as State Farm’s Brief on the Merits noted, the courts have not settled on precisely what you need to have found. This may make a bench trial on attorneys’ fees more practical, as you can attempt to get the court to set forth a litany of factors. However, if you submit the issue to the jury, presumably the Texas Supreme Court’s insistence on broad form submission should allow you to pose a simple question: Do you find the claimant’s demand excessive? This would be followed by instruction on what to consider using the list from State Farm’s brief.

C. Parties May Contractually Waive Chapter 38 Attorneys’ Fees

Parties to a contract may agree to waive the right to recover attorneys’ fees under Chapter 38. See Bank of Am., N.A. v. Hubler, 211 S.W.3d 859, 865 (Tex. App.—Waco 2006, pet. granted, judgm’t vacated w.r.m.); MeadWestvaco Corp. v. Way Serv., Ltd., No. 09-15-00014-CV, 2016 Tex. App. LEXIS 1148, at *28 (Tex. App.—Beaumont Feb. 4, 2016, no pet.) (mem. op.). However, the contractual provision must intentionally relinquish a known right and specifically exclude “a ‘statutory claim to an award of attorney’s fees’ under Chapter 38.” Hubler, 211 S.W.3d at 865 (quoting Tex. Nat'l Bank v. Sandia Mortg. Corp., 872 F.2d 692, 701 (5th Cir. 1989)). In Hubler, the court explained:

The parties’ contract states that the Bank is not liable for “special or consequential losses or damages of any kind, including loss of profits and opportunity or for attorney’s fees incurred.” The Bank contends this provision bars Hubler’s claim for attorney’s fees. We disagree. The contract’s language is too general to apprise Hubler of what rights she is relinquishing, namely her statutory right to attorney’s fees under Chapter 38. See id. Accordingly, the contract is not sufficiently specific to constitute a waiver of statutory attorney’s fees. See id.

Id. at 865. More recently, the Fifth Court of Appeals noted:

Although the Texas Supreme Court has not considered the specific issue of whether a limitation on incidental damages is sufficiently specific to effectuate a waiver of statutory attorneys’ fees under Section 38.001, a panel of this court and intermediate appellate courts to decide the issue have found such a limitation insufficient.
Chapter 38 does not use the phrase “prevailing party.” However, the phrase is common in general attorneys’ fees jurisprudence, and its application appears to have leached through to Chapter 38 cases as well. See Green Int’l, Inc. v. Solis, 951 S.W.2d 384, 390 (Tex. 1997) (recognizing the “party must prevail”).

A. Ordinary Meaning: Receive Some Relief or Direct Benefit Altering the Parties’ Relationship

As the statute does not use the phrase “prevailing party,” it likewise does not define it. Courts considering the definition often cite Intercontinental Group Partnership v. KB Home Lone Star L.P., which involved both a contractual provision providing for the recovery of attorneys’ fees to the prevailing party (undefined by the contract) as well as Chapter 38. See 295 S.W.3d 650, 652-53 (Tex. 2009). In that case, the jury found that Intercontinental Group breached the contract, a sum of zero dollars would fairly compensate KB Home, and $66,000 constituted reasonable attorneys’ fees to KB Home. The trial court entered a judgment accordingly. Id. at 654-55. As neither the statute nor the contract defined the phrase “prevailing party,” the Texas Supreme Court turned to the U.S. Supreme Court’s decision in (1) Hewitt v. Helms, which determined that respect for ordinary language requires that a plaintiff receive at least some relief (a damages award, injunctive or declaratory relief, or a consent decree or settlement in his favor) on the merits of his claim before he can be said to prevail, and (2) Farrar v. Hobby, in which the Court found that the plaintiff prevailed to the extent he was awarded $1, explaining that in civil rights cases the plaintiff who receives some direct benefit that materially alters the relationship of the parties has prevailed. See id. at 653-54. However, the Texas Supreme Court refused to extend this line of cases, holding: “[I]t is untenable to say that KB Home prevailed and should recover attorney’s fees. A stand-alone finding on breach confers no benefit whatsoever. A zero on damages necessarily zeroes out ‘prevailing party’ status for KB Home.” Id. at 655-56. See also AME & FE Invs., Ltd. v. NEC Networks, LLC, No. 04-17-00332-CV, 2019 Tex. App. LEXIS 378, at *47-48 (Tex. App.—San Antonio Jan. 23, 2019, no pet. h.) (mem. op.); Lyons v. Ortego, No. 01-17-00092-CV, 2018 Tex. App. LEXIS 6688, at *18-20 (App.—Houston [1st Dist.] Aug. 23, 2018, pet. filed) (mem. op.) (relying on Green Int’l, Inc. v. Solis, 951 S.W.2d at 390, for the proposition that Chapter 38 requires that the party “must prevail on the cause of action and recover damages” and on Intercontinental Grp. P’ship, 295 S.W.3d at 660-61, for the proposition that under contractual provision not defining “prevailing party” “a breach finding, without a monetary, equitable [specific performance], or declaratory award, is insufficient to make the plaintiff a prevailing party”).

While Chapter 38 jurisprudence presumes recovery by the prevailing party and most contracts provide only for recovery by the prevailing party, not all statutes or contracts limit the court to awarding fees to the prevailing party. Indeed, section 37.009 of the Texas Declaratory Judgment Act provides that the trial court may award costs and reasonable and necessary attorneys fees as are equitable and just, which means that the court may award fees to the prevailing party, fees to the non-prevailing party, or no fees at all. The point is that each statute and contract must be reviewed for its wording and standards.
Further, the Texas Supreme Court clarified that “prevailing party” is determined by the judgment, not the verdict (in which KB Home obtained a favorable finding on breach). See Intercontinental Group, 295 S.W.3d at 656-57.

Thus, two significant differences between Chapter 38 and the typical contractual provision are that under Chapter 38 (1) only the successful claimant can recover fees (the successful defendant cannot) and (2) to be a successful claimant one must be awarded damages on the cause of action for which Chapter 38 fees are claimed. See Range v. Calvary Christian Fellowship, 530 S.W.3d 818, 837-38 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing Ashford Partners, Ltd. v. ECO Res., Inc., 401 S.W.3d 35, 40-41 (Tex. 2012) and finding that neither party had prevailed under Chapter 38 as it had not been awarded damages under the contract, but holding that Calvary Christian had prevailed under the contractual provision as it obtained a defense verdict on the main issues). See also Carmax Bus. Servs. v. Horton, No. 14-17-00840-CV, 2018 Tex. App. LEXIS 6570, at *9 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.) (mem. op.) (holding Chapter 38 does not provide a fee recovery for a successful defendant and, where no damages are proven on counterclaim, the defendant cannot recover fee as prevailing claimant); Kenyon Int'l Emergency Servs. v. Starr Indem. & Liab. Co., No. 01-17-00386-CV, 2018 Tex. App. LEXIS 9758, at *20 (App.—Houston [1st Dist.] Nov. 29, 2018, pet. filed) (mem. op.) (finding that, while plaintiff had recovered damages on several theories, none would support fees under Chapter 38 as the only one of those plaintiff pleaded was breach of contract and the court granted a summary judgment against the contract claim); Davenport v. Hall, No. 04-14-00581-CV, 2019 Tex. App. LEXIS 2848, at *18-20 (Tex. App.—San Antonio Apr. 10, 2019, no pet. h.) (mem. op.) (plaintiffs’ recovery was not for breach of contract or other Chapter 38 ground and overturning an award of nearly $1.5 million in fees). Thus, as there are two different standards, you should consider pleading recovery under both Chapter 38 and the contract, assuming it has a contractual attorneys’ fees provision.

On the other hand, some courts have simply said “that a prevailing party is the party who successfully prosecutes a cause of action or defends against it” or “the party to a suit who successfully prosecutes the action or successfully defends against it, even though not necessarily to the extent of his original contention.” See Brinson Benefits, Inc. v. Hooper, 501 S.W.3d 637, 641-42 (Tex. App.—Dallas 2016, no pet.) (involving a Texas Theft Liability Act claim for attorneys’ fees, not a Chapter 38 or breach of contract claim, and thereby possibly explaining the difference).

As discussed in more detail below, when the case involves multiple theories, claims, and counterclaims with numerous rulings, questions answered in the jury verdict, and a judgment, another method is looking to who obtains some form of relief in the judgment on the “main action” or “main issue” in the case. See Bhatia v. Woodlands N. Houston Heart Center, PLLC, 396 S.W.3d 658 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).
B. Only One Party Prevails, It is Not a Theory by Theory Determination

The Dallas Court of Appeals held that even when a plaintiff pleads multiple theories or elements of damages against a defendant, there is only one prevailing party under the TTLA. See Hooper, 501 S.W.3d at 641-42. In that case, the plaintiff, Brinson, brought a TTLA claim against Hooper. At trial, Brinson prevailed on its TTLA claim against Hooper. On appeal, Hooper argued that Brinson had alleged two TTLA claims against her and that she prevailed on one of the two. See id. at 642. Brinson countered that it had but one TTLA cause of action with two sources of damages, one of which was foreclosed by directed verdict. See id. Although recognizing that two sister courts of appeals have awarded defendants attorneys’ fees when they prevailed on a TTLA claim, but lost on another cause of action, the Dallas Court of Appeals sided with Brinson, finding that it had only one claim for which it sought only one jury question, and distinguished Brown v. Kleerekoper, a case in which the plaintiff pleaded two separate theft claims implicating two separate penal code sections for which it sought two separate jury questions. See id. Further, the Dallas Court of Appeals opined that if it had determined that Brinson had pleaded two separate TTLA claims, it would still find that Brinson was the prevailing party, as the court had awarded it TTLA damages, rejecting the notion that it had to award attorneys’ fees to whomever prevailed on a theory by theory basis. See id. at 642-43. Arguably, this is just an extension of the “main action” or “main issue” rule for identifying the “prevailing party.” However, the specific rejection of the theory-by-theory method may be useful in cases in which multiple theories of liability are based on the same set of facts or cause of action.

C. No Net Recovery Due to Offset from Counterclaim vs. Settlement

“A recovery of attorney’s fees under section 38.001 is allowed even though the damages a party recovers are completely offset by the claim of the opposing party. McKinley v. Drozd, 685 S.W.2d 7, 10-11 (Tex. 1985). Thus while a party must prevail on a ground under 38.001, it need not obtain a net recovery.” Brent v. Field, 275 S.W.3d 611, 622 (Tex. App.—Amarillo 2008, no pet.). See also Thomas v. Bobby D. Assocs., No. 12-08-00007-CV, 2008 Tex. App. LEXIS 5881, at *4 (App.—Tyler Aug. 6, 2008, no pet.) (mem. op.) (specifically noting a party’s entitlement to attorney’s fees even though there is no net recovery as the damages awarded on its claim were completely offset by the opposing parties’ counterclaim and citing McKinley v. Drozd and Matthews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985)). However, the no-net-recovery exception does not apply when the damages awarded by the jury are offset by settlement.

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15 Brinson also brought numerous other causes of action, none of which provided a ground for recovering attorneys’ fees and, conversely, Hooper and the other defendants brought numerous causes of action in their counterclaims, none of which allowed for recovery of attorneys’ fees.

16 Brinson Benefits also involved Brinson claiming two other defendants conspired with Hooper to commit theft. We discuss the court’s ruling on those conspiracy claims below. See infra at p. 106. Section VI. Certain Causes of Action. D. Conspiracy: Look to the Underlying Tort.

17 McKinley v. Drozd involved a DTPA claim; however, attorneys’ fees were claimed under both the DTPA and Chapter 38, and the Texas Supreme Court wrote separately on McKinley’s right to recover attorneys’ fees under each statute.
 credits or insurance payment credits. See Bobby D. Assocs., 2008 Tex. App. LEXIS 5881, at *4 (citing Imperial Lofts, Ltd. v. Imperial Woodworks, Inc., 245 S.W.3d 1, 7 (Tex. App.—Waco 2007, pet. denied)). Explaining the rationale for the difference, the First Court of Appeals stated: “This is so because, as this Court has held, ‘[i]t is one thing to allow an attorney’s fees award on a successful claim notwithstanding an opposing party’s success on an offsetting claim,’ but it is quite another ‘to allow attorney’s fees on a claim that, although successful, was paid in full before trial.’”


D. Amount Recovered Less Than Tendered or Sought at Trial Does Not Matter, Since Still Prevailing Party

KB Home did not involve a tender. Debtors/defendants have argued that a claimant has not prevailed if the tender exceeded the award. This argument has been rejected. In Crisp Analytical Lab, L.L.C. v. Jakalam Properties, Ltd., the Dallas Court of Appeals was unfazed by (1) the differential between the amount “tendered” and the amount of damages awarded and (2) the amount in damages sought compared to the amount actually awarded (sought 20 time more), leading the court to explain that what matters is not how much is sought, but that something is recovered. See 422 S.W.3d 85, 92-93 (Tex. App.—Dallas 2014, pet. denied). The court relied on Mira Mar Development Corp. v. City of Coppell, which involved attorneys’ fees sought pursuant to a Texas Local Government Code statute. See 421 S.W.3d 74, 104-05 (Tex. App.—Dallas 2013, no pet.). In that case, the plaintiff-developer sought approximately $800,000 in damages but was only awarded approximately $40,000; the Dallas Court of Appeals nevertheless found that the plaintiff-developer was the prevailing party. See id. at 105. See also Serralde v. Flores, No. 04-17-00078-CV, 2018 Tex. App. LEXIS 1344 (Tex. App.—San Antonio Feb. 21, 2018, no pet.) (mem. op.) (the court, citing KB Homes for the proposition that a prevailing party need only recover “some relief on the merits”, rejected appellant’s argument that the appellee did not prevail as appellee recovered only 50% of the breach of contract damages sought).

E. Amount at Issue Small Enough for JP Court Is Not a Defense to Fee Award

In KKR Rv’s, LLC v. Andersen, the appellate court rejected the argument that the trial court’s fee denial was appropriate as the plaintiff could have filed suit in justice of the peace or small claims court and proceeded pro se, making the expenditure of fees wholly unnecessary. See No. 01-18-00178-CV, 2018 Tex. App. LEXIS 9901, at *9-10 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet.) (mem. op.). Part of the court’s reasoning was that while corporations may now proceed in justice of the peace court without representation, they often have counsel there and any appeal would have required counsel.

18 In addition to being an issue potentially related to tender, the amount involved and the results obtained is the fourth Arthur Andersen factor. As such, it also can impact the reasonableness of the fee and can be attacked on that basis as well. See Section V. Proving Attorneys’ Fees, A. Arthur Andersen Factors and Lodestar infra at p. 40.

19 The “tender” was 7 times greater than the amount awarded leading to the rejected argument of whether Jakalam really prevailed as required by Texas Civil Practice & Remedies Code §38.001.

20 The statute at issue provided that “A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney’s fees, including expert witness fees.” Tex. Loc. Gov’t Code § 212.904(e).
F. Contractual Provisions

1. Generally, the Contract Controls, Not Statutes or Case Law

Parties are free to contract for attorneys’ fees and related terms, including the definition of prevailing party. In *Kingsley Properties, LP v. San Jacinto Title Services of Corpus Christi, LLC*, the court considered a contract in real estate transactions with ancillary title and escrow work. See 501 S.W.3d 344 (Tex. App.—Corpus Christi 2016, no pet.). The Corpus Christi Court of Appeals recognized that contracting parties are “masters of their own choices” and may determine the standard that will govern the attorneys’ fee award for a “prevailing party.” In such cases, it is the language of the contract, not the statute or case law, which governs. See id. at 349. There, the court determined that the prevailing defendant was not a “party” as defined by the contract (a decision drawing a dissent) and rejected the prevailing defendant’s argument that the court apply the legal meaning that the term “prevailing party” has acquired in the case law. See id. at 349-51. See also *Swan v. Bienski Props.*, No. 10-14-00309-CV, 2018 Tex. App. LEXIS 7665, at *28-29 (App.—Waco Sep. 19, 2018, no pet.) (mem. op.) (finding defendant guarantor on apartment lease was not a party (as she was not named in contract) and, therefore, she could not rely on the prevailing party provision of lease to support attorneys’ fees claim and also refusing to extend line of cases that hold similar language to the provision at issue in the first lease contract permitted third-party real estate brokers to recover attorneys’ fees to the guarantor in this case); *KKR Rvs, LLC v. Andersen*, No. 01-18-00178-CV, 2018 Tex. App. LEXIS 9901, at *8 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet.) (mem. op.) (recognizing that (a) “parties may agree by contract to a fee-recovery standard that differs from Chapter 38’s” and “when they do so, any fee claim is governed by the terms of their contract”); and *Morales v. Carlin*, No. 03-18-00376-CV, 2019 Tex. App. LEXIS 2398, at *19-20 (Tex. App.—Austin Mar. 28, 2019, no pet. h.) (mem. op.) (holding that defendant who obtained summary judgment to end the litigation was “prevailing party” where contract did not so define and, therefore, the standard definition was applied).

2. Prevailing Party Undefined: Main Action or Main Issue Determinative

However, where the contract does not define “prevailing party,” many courts follow the “main action” or “main issue” rule. For instance, in *Bhatia v. Woodlands North Houston Heart Center, PLLC*, the Fourteenth Court of Appeals considered the meaning of “prevailing party” in a lawsuit that involved the breakup of a medical practice group with at least two partnerships (one for the practice and one for the imaging). See 396 S.W.3d at 658. Bhatia filed suit, alleging several theories of recovery, and Woodlands North counterclaimed. Both sides asserted claims well beyond a simple breach of the partnership agreement. Some of the causes of action were dealt with on motion practice. Others were abandoned. Neither side “won out” on all of its claims. The jury found that both parties violated their fiduciary duties, but no party was liable for any damages to any other party. As they obtained take nothing judgments, the trial court awarded Woodlands North its attorneys’ fees and Bhatia appealed this decision. The Fourteenth Court of Appeals noted that the partnership agreement provided for attorneys’ fees for the prevailing party; however, it did not define that phrase, requiring the court to determine who prevailed on the “main action” or the “main issue” in the litigation. For a defendant like Woodlands North, such a determination would mean successfully defending the main action, typically equating to obtaining a take-nothing
judgment on the main issue or issues in the case. See 396 S.W.3d at 669-70. Woodlands North argued that it prevailed, as the jury found in its favor on the only issue concerning the partnership agreement that was submitted in the jury charge. See id. at 670. The Fourteenth Court of Appeals determined that the partnership agreement required looking not merely at the breach of contract issue, but to all the issues in the litigation. It noted:

However, Section 16.3 in the partnership agreement was not limited to litigation regarding a breach of the agreement itself; Section 16.3 included “litigation . . . relating to . . . the subject matter” of the agreement. Cf. Trinh v. Lang Van Bui, No. 14–11–00442–CV, 2012 Tex. App. LEXIS 9058, at *40-41 (Tex. App.–Houston [14th Dist.] Nov. 1, 2012, no pet. h.) (mem. op.) (holding attorney’s fees provision in contract was broad enough to encompass tort claims); Fitzgerald, 345 S.W.3d at 630–31 (holding attorney’s fees provision applied beyond breach-of-contract context). The subject matter of the agreement was the partnership.

Id. at 671. The Fourteenth Court of Appeals endeavored to determine the “main issues” so they could determine who was the prevailing party at trial. See id. This required looking at which causes of action were the emphasis at trial or in terms of the relief sought. See id. To do so, the court considered: (1) the clear focus at trial, (2) the bases for the vast majority of the testimony, (3) the primary bases for Bhatia’s claim that he was entitled to $7.29 million in actual damages, and (4) the focus of the appeal. See id. Based on these criteria, the Fourteenth Court of Appeals determined that Bhatia’s breach of contract and breach of fiduciary duty claims were the main action. None of the other claims raised by Bhatia, or any of the claims raised by appellees, were of similar consequence or emphasis. Finding that Woodlands North obtained a take nothing judgment on these causes of action, the court held it was the prevailing party and upheld its award of attorneys’ fees. See id.

In another case involving a contractual provision providing for attorneys’ fees to the “prevailing party,” where the phrase was undefined, the First Court of Appeals wrote a veritable treatise. See www.urban.inc. v. Drummond, 508 S.W.3d 657 (Tex. App.—Houston [1st Dist.] 2016, no pet.). After reviewing the “prevailing party” jurisprudence, including the Texas Supreme Court’s decisions in KB Home and Epps, the First Court of Appeals rejected Urban’s argument that KB Home rejected the “main issue” test. See id. at 666-67. The First Court of Appeals explained that the KB Home opinion was not only fact specific, but a rebuttal to the dissent, and therefore it did “not read KB Home as rejecting ‘main issue’ analysis in all cases in which a contractual attorney’s fee provision controls, but, rather, only in those cases in which such analysis is incompatible with a controlling contractual provision.” See id. at 667-68. Despite Urban defeating Drummond’s numerous counterclaims and affirmative defenses and succeeding on most of the claims and affirmative defenses in the case in motion practice, the First Court of Appeals rejected Urban’s argument that it had prevailed, saying “regardless of whether Urban successfully defended against other issues raised in this case, particularly in motion practice, a ‘prevailing party’ is one that succeeds on the main issue.” Id. at 669.

21 This case has an odd subsequent appellate history. In a subsequent opinion issued on February 7, 2017, the First Court of Appeals acknowledged that the case settled and denied the parties’ joint motion to vacate the opinion, but granted the parties’ joint motion to vacate its judgment arising from that opinion. www.urban.inc. v. Drummond, No. 01-14-00299-CV, 2017 Tex. App. LEXIS 1284 (Tex. App.—Houston [1st Dist.] Feb. 7, 2017, no pet.).
See also Anglo-Dutch Energy, LLC v. Crawford Hughes Operating Co., 2017 Tex. App. LEXIS 9424* at *13-14 (Tex. App.--Houston [14th Dist.] 2017, pet. denied) (mem. op.) (finding where the contract does not define “prevailing party,” the courts will give utilize the “main issue” test as the ordinary meaning).

(a) PRACTICE POINTER: “Main Issue” Analysis Better With Entire Record

In www.urban.inc, the parties presented a partial reporter’s record on appeal as permitted by Texas Rule of Appellate Procedure 34.6(c). In doing so, they prevented the appellate court from being able to review the entire trial record to determine the “main issue.” If you are disputing who the prevailing party is, you probably should provide the complete transcript, unless the jury’s answers to the issues submitted makes you appear to be the prevailing party. If there was significant motion practice and major parts of the case (possibly the “main issue”) were decided by motions for summary judgment, you should also be sure that the clerk’s record is complete.

(b) PRACTICE POINTER: Consider Contractually Defining “Prevailing Party”

While most of us do not have a chance to draft or comment on contracts, those that do might wish to define “prevailing party” if they are not satisfied with the ordinary meaning or the main action analysis.

3. No Relief to Breaching Party, Unless Excused

www.urban.inc. also addresses the issue of whether a breaching party can recover attorneys’ fees under the contract. There, the jury found that both parties breached the exclusive brokerage agreement, but that Urban had failed to materially comply first, Urban’s failure was not excused, and Urban breached its fiduciary duty to Drummond (as an affirmative defense, not an affirmative action). Urban relied on cases that recognize that once a party has breached it cannot later sue on the contract. In other words, you cannot breach a contract and then seek to enforce the favorable provisions of that contract. Urban further argued that the jury did not affirmatively find that Drummond’s breach was excused. However, the First Court of Appeals noted that:

Drummond’s failure to comply with the Agreement was excused as a matter of law by Urban’s prior material breach. See Mustang Pipeline Co., 134 S.W.3d at 196. Because Drummond’s breach was excused as a matter of law, no jury finding on this issue was necessary. The jury’s finding of breach in this context also does not prevent Drummond from recovering his costs and attorney’s fees under the Agreement’s prevailing party provision. See Chevron Phillips Chem. Co., 346 S.W.3d at 71-72 (affirming award of contractual attorney’s fees to party jury had found failed to comply with contract; party’s failure to comply was excused by impracticability).

Urban also cites to several cases for the general proposition that contracting parties cannot take advantage of favorable provisions of a contract they breached. All of these cases, however, are distinguishable because none of them involve a breaching party’s attempt to enforce a contractual attorney’s fees provision when that party’s breach was excused.
As the Texas Supreme Court noted in *Mustang Pipeline*, invariably both parties breach. The question is who committed the first unexcused, material breach.

4. **Scope of the Provision: Broad vs. Narrow**

Another issue is the scope of the provision. This affects not only whether you may recover a fee, but also for what activities (all claims and causes of action, both prosecution and defense, against all or just some parties). In *Murphy v. Exeter Financial Corp.*, the court considered whether the prevailing party succeeded in “enforc[ing] this contract.” 558 S.W.3d 207, 214-15 (Tex. App.—Texarkana Aug. 9, 2018, no pet.). In doing so, the court compared “enforcing the contract” language, which case law narrowly construes, with language such as “related to,” “brought under,” or “with respect to” the contract, which case law has interpreted rather broadly. See *id.* In this usury case arising from a truck purchase, the court found that although the prevailing defendant claimed that the plaintiff defaulted on the sales contract, the defendant did not attempt to repossess the car, bring a counterclaim for breach of contract, or seek any other relief under the contract. See *id.* at 215. Thus, the court concluded that the prevailing defendant had not attempted to enforce the contract and could not recover fees thereunder.

5. **Exclusive Remedy and Limitation of Liability Provisions Do Not Preclude Recovering Attorneys’ Fees**

Many contracts have exclusive remedy provisions. In one real estate contract, the seller prevailed on breach of contract claim in which one of the contract’s provisions stated seller’s “sole remedy” was return of earnest money and another provision provided prevailing party entitled to attorneys’ fees. The trial court found the “sole remedy” provision controlled and denied the fees award. The court of appeals recognized the longstanding distinction between damages and fees and gave meaning and force to both provisions awarding seller its fees. See *Morben Realty Co. v. Tex. Capital Holdings, LLC*, No. 05-17-01105-CV, 2019 Tex. App. LEXIS 1474, at *1 (Tex. App.—Dallas Feb. 27, 2019, no pet. h.) (mem. op.).22 Similarly, the Austin Court of Appeals harmonized the exclusive remedy language in the two provisions on which the plaintiff brought its breach of contract action with a separate attorneys’ fees provision in a landlord-tenant dispute. See *Saltworks Ventures, Inc. v. Residences at The Spoke, LLC*, No. 03-16-00711-CV, 2018 Tex. App. LEXIS 3463 (Tex. App.—Austin May 17, 2018, no pet.) (mem. op.). Explaining that the defendant misconstrued the contract, the Austin Court of Appeals explained that exclusive remedies provided in the delayed premises delivery provision and the delayed completion of common area provision (the two provisions forming the basis of the suit) gave rise to the overall breach of contract claim to which the prevailing party attorneys’ fee provision applied. Thus, like the Dallas Court of Appeals in *Morben Realty*, the Austin Court of Appeals also distinguished the exclusive remedies

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22 In reviewing the appellate history on this case, it appears that the appellant failed to file a brief and, as a result, appellant’s appeal was dismissed. The appeal proceeded on cross-appellants issues and brief. The appellant/cross-appellee did not file a brief in response to cross-appellants. Needless to say, appellant has requested an extension of time to file a motion for rehearing.
for certain contractual provisions from the overall breach of contract claim thereby allowing attorneys’ fees. *Id.* at *35-37.

**G. Attorneys’ Fees Typically Are Not Damages Supporting Status as Prevailing Party**

The Texas Supreme Court has noted that both Texas courts and the Texas legislature distinguish attorney’s fees from damages.” See *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172 (Tex. 2013. As such, attorneys’ fees typically do not support prevailing party status. Indeed, the Texas Supreme Court admonished that “We have previously said that ‘suits cannot be maintained solely for the attorney’s fees; a client must gain something before attorney’s fees can be awarded.’” However, after stating the general rule, the Texas Supreme Court conceded exceptions exist and distinguished attorney’s fees incurred in prosecuting this claim, which are not compensatory damages, from the fees comprising the breach-of-contract damages, such as attorneys suing for unpaid fees, which would be damages. *Id.* at 175. See also *Peace v. ITCOA, LLC*, No. 13-16-00370-CV, 2018 Tex. App. LEXIS 8457, at *17-18 (App.—Corpus Christi Oct. 18, 2018, pet. filed) (mem. op.).

**H. Defendant as Prevailing Party in Contract and Certain Statutory**

While Chapter 38 does not authorize attorneys’ fees to the prevailing defendant, many contracts and other statutes do. For instance, in *Severs v. Mira Vista Homeowners Ass’n*, the Fort Worth Court of Appeals considered two principal issues: (1) the distinction between a prevailing plaintiff and a prevailing defendant and the standards applicable to each and (2) under what circumstances a defendant is the “prevailing party” when a plaintiff files a non-suit. *Severs v. Mira Vista Homeowners Ass’n*, 559 S.W.3d 684, 706-713 (Tex. App.—Fort Worth 2018, pet denied).

1. **Standard for Prevailing Defendant**

In *Severs*, the contractual provision provided that the “prevailing party” recover attorneys’ fees from the “non-prevailing party” and the court recognized that such provisions are equally applicable to a successful plaintiff and successful defendant. *Id.* at 707. The court then explained that, in either case, the issue is whether the successful party altered or changed the legal relationship between the parties. *Id.* at 708. For plaintiffs, this requires obtaining some meaningful relief, such as damages or equitable relief; however, for defendants, this includes successfully defending and obtaining a take nothing judgment on the contract claim. *Id.* at 708-09. In this case, the defendants obtained a summary judgment and was, therefore, the prevailing party entitled to attorneys’ fees under the contractual provision. Also, as the plaintiffs recovered nothing, they were the “non-prevailing party” under the contract. *Id.* at 709.

2. **Epps Criteria for Prevailing Defendant Based on Non-Suit without Prejudice**

The *Severs* case then turned to considering whether a second set of defendants were prevailing parties after the plaintiffs filed non-suit without prejudice. First, the court acknowledged that a non-suit with prejudice “is tantamount to a judgment on the merits and its res judicata effect thereby permanently and inalterably changes the legal relationship among the parties.” *Id.* at 710 (citing *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011)). With respect to non-suits without prejudice,
Epps held that the defendant could be a prevailing party if it could prove that the plaintiff took the nonsuit in order to avoid an adverse or unfavorable ruling on the merits. *Id.* at 711

The Epps court provided some factors for courts to consider in analyzing whether a plaintiff has nonsuited to avoid an unfavorable ruling, including (1) the timing of the nonsuit, (2) if the plaintiff has an unexcused failure to obtain discovery of evidence that might disprove its claim, (3) the failure to designate material or expert witnesses, and (4) the existence of other procedural obstacles, such as the inability to join necessary parties. *Id.* at 870-71.

*Severs*, 559 S.W.3d at 711. Finding that the nonsuit was taken at a time when no motion for summary judgment was pending, no overdue discovery responses were outstanding, no failure to identify experts had occurred, and no failure to join necessary parties had occurred, the *Severs* court determined that the second set of defendants had not prevailed by the plaintiffs filing a nonsuit without prejudice. *Id.*

Additionally, “the trial court may consider whether the plaintiff's claims had merit when filed, this is generally done when dismissal follows a post-filing occurrence, such as a change in the law or the discovery of evidence revealing previously unknown flaws in the case.” *Gee Roach v. Liat Turkia*, No. 05-18-00142-CV, 2019 Tex. App. LEXIS 949, at *11 (Tex. App.—Dallas Feb. 11, 2019, no pet.) (mem. op.). In that case, the Dallas Court of Appeals also noted that the trial court’s determination of “prevailing party” is reviewed on an abuse of discretion standard. *Id.* at *9.

**I. If Awarded Trial Fees, Must Be Awarded Appellate Fees**

“‘If trial attorney’s fees are mandatory under [the statute], then appellate attorney’s fees are also mandatory when proof of reasonable fees is presented.’” *Urquhart v. Calkins*, No. 01-17-00256-CV, 2018 Tex. App. LEXIS 5145, at *11 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet. h.) (mem. op.) (quoting *Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) and reversing trial court’s refusal to award conditional appellate fees for the second appeal of the case). See also *C&C Rd. Constr. v. Saab Site Contractors, L.P.*, No. 08-17-00056-CV, 2019 Tex. App. LEXIS 2541, at *31-32 (Tex. App.—El Paso Mar. 29, 2019, no pet. h.). In *Urquhart*, the court also identified Chapter 38 as one of the statutes requiring mandatory appellate fees, assuming pleading and proof. *Urquhart*, 2018 Tex. App. 5145, at *11. (citing *Gill Sav. Ass’n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (per curiam)). Likewise, courts have interpreted the Texas Citizen’s Participation Act to require mandatory trial court and, therefore, mandatory appellate fees. *DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 863-64 (Tex. App.—Fort Worth 2018, no pet.) (relying on cases holding that appellate fees are mandatory under Chapter 38). Finally, where there is conflicting testimony on appellate fees, the trial court has the discretion to determine the proper amount to award in appellate fees, but no discretion to award no appellate fees. *Urquhart*, 2018 Tex. App. 5145, at *12 (citing *Ventling*, 466 S.W.3d at 155).

**J. Only Successful Appeal Results in Appellate Attorneys’ Fees**

Regardless of language in the trial court’s judgment, recovery of appellate attorneys’ fees is conditional upon the party’s success on appeal. *See Anambra State Cmty. in Hous., Inc. (ANASCO) v. Ulas*, No. 14-16-01001-CV, 2018 Tex. App. LEXIS 2344, at *11-12 (App.—Houston [14th
In that case, the trial court’s order arguably awarded the appellee attorneys’ fees in the event of an appeal. *Id.* at *11. Recognizing that a party may not be penalized for a successful appeal of error in the lower court’s judgment, the Houston Fourteenth Court of Appeals ruled:

> “However, it is implicit in the court’s judgment that all the attorneys’ fees awarded, trial and appellate, are conditioned on the judgment's successful survival of the appellate process.” *Id.*; see also *Solomon v. Steitler*, 312 S.W.3d 46, 59 (Tex. App.—Texarkana 2010, no pet.) (recognizing award of appellate attorney’s fees “implicitly requires success in order to recover the fees” and reforming “the judgment to explicitly clarify that the award is conditional”).

*Id.* at *11-12 (initially quoting *Robinwood Bldg. & Dev. Co. v. Pettigrew*, 737 S.W.2d 110, 112 (Tex. App.—Tyler 1987, no writ) (citing *King Optical v. Automatic Data Processing of Dallas*, 542 S.W.2d 213 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.)).23 See also *In the Interest of T.L.T.*, No. 05-16-01367-CV, 2018 Tex. App. LEXIS 2025, at *11-12 (Tex. App.—Dallas Mar. 21, 2018, no pet.) (mem. op.) (explaining that “an unconditional award of appellate attorney’s fees does not require reversal, but may modified to make the award of appellate attorney’s fees contingent upon the receiving party’s success on appeal.”); *Richardson Communications. & Consulting v. McNeese*, No. 05-17-00969-CV, 2018 Tex. App. LEXIS 10245, at *18-19 (App.—Dallas Dec. 12, 2018, no pet. h.) (mem. op.) (modifying “the trial court's awards of appellate attorney’s fees to be contingent on McNeese prevailing on appeal or petition for review”).

This begs the question: What is a successful appeal. In *CTMI, LLC v. Ray Fischer & Corporate Tax Management*, the Dallas Court of Appeals addressed this issue. See No. 05-16-01327-CV, 2018 Tex. App. LEXIS 3387, at *15-23 (Tex. App.—Dallas May 15, 2018, no pet.) (mem. op.). It began by looking at the terms of the final judgment, which provided for fees (1) “in the event of an unsuccessful appeal by any of the Defendants to the Court of Appeal [sic], against one or more of the Plaintiffs” and (2) in the event of an unsuccessful appeal by any of the Defendants to the Supreme Court of Texas against one or more of the Plaintiffs.” The Dallas Court of Appeals, relying heavily on *Southwest Galvanizing, Inc. v. Eagle Fabricators, Inc.*, 447 S.W.3d 473, 477 (Tex. App.—Houston [14th Dist.] 2014, no pet.), focused who initiated each stage of the appeal and whether at that stage the Defendant was ultimately unsuccessful. Based on the strict terms of the judgment, the Plaintiff could only recover for an unsuccessful appeal by the Defendants, not an appeal by the Plaintiffs. The defendant appealed the adverse judgment to the court of appeals and, while they obtained a reversal in the court of appeals, the Texas Supreme Court restored the trial court’s judgment. Thus, the Defendants had taken an appeal to the court of appeals and were ultimately unsuccessful. Hence, the court of appeals found the Plaintiff entitled to recover their fees for that level appeal. However, as the Plaintiff actually brought the appeal to the Texas

Supreme Court, the Dallas Court of Appeals found that the Plaintiffs were not entitled to fees for the appeal to the Texas Supreme Court as that had not been an “appeal by any of the Defendants.”

Finally, the success is measured by the last appellate decision. Thus, even if a party is awarded conditional appellate fees for both the intermediate court and the Texas Supreme Court and wins in the intermediate court only to lose in the Texas Supreme Court, that party does not recover any of its conditional appellate fees. In other words, the party’s victory at the intermediate level is nullified by the loss at the Supreme Court and the party does not get the conditional intermediate fees just because it won there. See Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101, 115-16 (Tex. 2018).

1. Practice Pointer: Make Judgment Conform to Pattern Jury Charge

While the case law is quite clear that the appellate fees must be conditioned on success, the question arises whether the successful party at trial should be limited to appellate fees only from the appeals by the opposing party. From the language of Richardson Communications and other cases, the success would seem to be at either level as longer as the appellee ultimately succeeds on the appeal. Likewise, this is not what the Pattern Jury Charge 115.60 on Attorney’s Fees suggests. Rather, it focuses exclusively on representation at each level. Presumably, a judgment focusing on representation in a successful appeal, rather than who brings the appeal should allow recovery regardless of who brings the appeal. A party entitled to attorneys’ fees should not be denied those fees because the trial court or appellate court errs in denying the party’s recovery on liability, damages, or attorneys’ fees forcing it to take a successful appeal to get what is rightfully its. Likewise, a party entitled to fees should be able to recover fees incurred in pursuing an unsuccessful intermediary appeal if ultimately successful on appeal to a higher court. The opposing party has little grounds to object and, if the trial court or intermediate appellate court erred in any of these regards, it was likely due to the opposing party’s position or its refusal to settle a valid claim.

24 PJC 115.60 Question on Attorney’s Fees

QUESTION ______

What is a reasonable fee for the necessary services of Paul Payne’s attorney, stated in dollars and cents?

Answer with an amount for each of the following:

1. For representation through trial and the completion of proceedings in the trial court.
   Answer: _______________

2. For representation through appeal to the court of appeals.
   Answer: _______________

3. For representation at the petition for review stage in the Supreme Court of Texas.
   Answer: _______________

4. For representation at the merits briefing stage in the Supreme Court of Texas.
   Answer: _______________

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.
   Answer: _______________
K. Appellate Court’s Can Consider Record and Own Knowledge to Assess Appellate Fees Awards

In Urquhart, the appellants complained that on remand the trial court had awarded only a combined total of $8,000 in fees for a prior appeal to the intermediate court and Texas Supreme Court. Like a trial court, an appellate court can consider the appellate record and draw on the common knowledge of the justices in determining whether the trial court abused its discretion with such an award. Urquhart, 2018 Tex. App. LEXIS 5145, at *8-9. In that case, the appellees did not really directly contest the appellate fees incurred in the prior appeal and the justices documented a lengthy and substantial appellate record. Id. at *8-11. The Houston First Court of Appeals concluded that the trial court’s award of appellate fees for the prior appeal was arbitrary and bore no relationship to the volume of work actually performed. Id. at 11-12. Accordingly, they remanded the prior appellate fees to the trial court for further consideration.

L. Conditional Appellate Fees Are Not Unconstitutional

In McIntyre v. Castro, the court rejected the appellant’s argument that awarding conditional appellate fees “chills an appellant’s right to appeal and offends principles of public policy and due course of law/due process under the Texas and United States Constitutions.” No. 13-17-00565-CV, 2018 Tex. App. LEXIS 7426, at *18-20 (Tex. App.—Corpus Christi Sep. 6, 2018, pet. denied) (mem. op.) (citing Pullman v. Brill, Brooks, Powell & Yount, 766 S.W.2d 527, 530 (Tex. App.—Houston [14th Dist.] 1988, no writ) (rejecting the argument that “the predetermined award of attorney’s fees in the event of appeal is unconstitutional as a violation of due process, or as a limitation on the right to access to the courts.”)).

V. Proving Attorneys’ Fees

A. Arthur Andersen Factors and Lodestar

The most universally acceptable method for proving reasonable attorneys’ fees is to follow the Arthur Andersen factors, particularly when combined with the lodestar method for evaluating the reasonable number of hours expended on the litigation supported by contemporaneous billing records. If you do this, you should have sufficient evidence to support your award. Conversely, if your opposing party does not fully comply with Arthur Andersen, lodestar, and submit contemporaneous billing records, be sure to make specific objections to each failure. In Arthur Andersen & Co. v. Perry Equipment Corp., the Texas Supreme Court articulated eight non-exclusive factors for establishing reasonable attorneys’ fees:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

See 945 S.W.2d 812, 818 (Tex. 1997) (citing Tex. Disciplinary R. Prof'l Conduct 1.04). 25 As explained in greater detail below, not all of the factors need be introduced into evidence. However, litigators should “at a minimum, [introduce] evidence ‘of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.’” Long v. Griffin, 442 S.W.3d 253, 255 (Tex. 2014) (citing El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 764 (Tex. 2012)). 26

25 After this paper was deep into the editing process, the Texas Supreme Court releases Rohrmoos Venture v. UTSW DVA Healthcare, LLP, No. 16-0006, 2019 Tex. LEXIS 389, at *1 (Apr. 26, 2019). This case is a treatise on lodestar and clarifies the standard for proving attorneys’ fees. Its holding include: (a) applying lodestar “where it can be employed”; (b) identifying the five factors to be used (“Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.”); (c) limiting Garcia and Kinsel, both of which found minimal evidence supported an attorneys’ fees award, to their facts and to no evidence challenges; (d) rejecting the minimalistic approach permitted by cases such as Jeff Kaiser P.C.; (e) requiring what federal courts refer to as “good billing judgment” to eliminate fee request hours that are excessive, redundant, duplicative, excessive, inadequately documented, or otherwise unnecessary; (f) finding lodestar driven fees to be presumptively (or, later, strongly presumptively) reasonable; (g) once lodestar is proven, shifting the burden of proof to the fee opponent to reduce the fee below lodestar; (h) recognizing courts can still enhance fees up or down, but not based on Arthur Andersen “considerations” subsumed in the base lodestar calculation (“the base lodestar calculation usually includes at least the following considerations from Arthur Andersen: ‘the time and labor required,’ ‘the novelty and difficulty of the questions involved,’ ‘the skill required to perform the legal service properly,’ ‘the fee customarily charged in the locality for similar legal services,’ ‘the amount involved,’ ‘the experience, reputation, and ability of the lawyer or lawyers performing the services,’ ‘whether the fee is fixed or contingent on results obtained,’ ‘the uncertainty of collection before the legal services have been rendered,’ and ‘results obtained.”’); (i) introducing contemporaneous billing records is strongly encouraged, but not mandated); and (j) rejecting broad descriptions of categories of work (reviewed millions of pages of documents, attended 40 plus depositions, filed five motions to compel, responded to extensive motion for summary judgment) as insufficient without more. This decision now begs several questions for further development: (1) under what circumstances can Lodestar not be employed; (2) other than contemporaneous billing records, what, if any, other documents or testimony will suffice (prior cases having allowed spreadsheets summaries (likely no longer sufficient), fee reconstruction, and forensic review of the file) and under what circumstances will these other forms of proof suffice; and (3) with this new, bright line standard, will courts now be more willing to render for insufficient proof, instead of the near universal remand to resolve almost all attorneys’ fees deficiencies.

26 Courts in the Fifth Circuit have a similar set of factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974). The Johnson factors are:

(1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) counsel’s experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the client; and (12) awards in similar cases.
When evaluating the reasonableness under the first factor, the Texas Supreme Court has recognized that the lodestar method has merit. See El Apple I, 370 S.W.3d at 762. The four lodestar factors for attorneys’ work are:

1. the nature of the work,
2. who performed the services and their rate,
3. approximately when the services were performed, and
4. the number of hours worked.

Id. at 763. For paralegals and legal assistants, Texas courts have required more information, such as:

1. the qualifications of the legal assistant to perform substantive legal work;
2. that the legal assistant performed substantive legal work under the direction and supervision of an attorney;
3. the nature of the legal work performed;
4. the legal assistant’s hourly rate; and
5. the number of hours expended by the legal assistant.

Id. In Hemink Farms, Ltd. v. BCL Construction, LLC, the appellant specifically complained that the appellee presented no testimony on the requirement that the legal assistant’s substantive legal work was performed under the direction and supervision of an attorney. Hemink Farms, Ltd. v. BCL Construction, LLC, No. 07-17-00457-CV, 2019 Tex. App. LEXIS 2209, at *19 (Tex. App.—Amarillo Mar. 20, 2019, no pet. h.) (mem. op.). In rejecting this complaint, the Amarillo Court of Appeals considered appellee’s counsel’s testimony that he had a paralegal work on the file, the manner and method that she kept track of her time and generated the bills, his review of her time; however, perhaps more importantly, the admitted contemporaneous billing records “detail the nature of the work done by [the legal assistant] and reflect instances where [counsel] gave instruction to her on tasks to be performed and reviewed the work she did.” Id. *19-20. [Another reason to introduce contemporaneous time records.] The Amarillo Court of Appeals concluded that counsel’s “testimony and the billing records indicate that [the legal assistant’s] work was done under his direction and supervision.” Id. at *20.

In El Apple I, the Texas Supreme Court reversed and remanded a $569,500 attorneys’ fees award since plaintiffs’ evidence did not provide sufficient information for a lodestar calculation. See id. at 764. El Apple I involved a claim under the Texas Commission on Human Rights Act, which the Texas Supreme Court concluded mandated the use of lodestar. As a result, some appellate courts questioned whether lodestar applied to other statutes (including Chapter 38) or breach of contract cases. However, “the Supreme Court of Texas has held that the El Apple I requirements apply to an attorney’s fees request under section 38.001 and under other statutes, if the evidence supporting the request “use[s] the lodestar method by relating the hours worked for each of the . . . attorneys multiplied by their hourly rates for a total fee.” Auz v. Cisneros, 477 S.W.3d 355, 359-60 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing Long v. Griffin, 442 S.W.3d 253, 255 (Tex. 2014)). See City of Laredo v. Montano, 414 S.W.3d 731, 736 (Tex. 2013, no pet.); Enzo Invs., LP v. White, 468 S.W.3d 635, 655 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
While the Texas Supreme Court has recognized the merit of lodestar for proving a reasonable fee, it has not required its use and attorneys are still free to prove up fees using the “traditional” method. However, where lodestar is “elected” as the methodology, *El Apple I*’s requirements apply.

**B. The Arthur Andersen Approach**

1. **Proof of All 8 Arthur Andersen Factors Is Not Necessary**

A trial court is not required to receive evidence on all of the *Arthur Andersen* factors and, where the evidence is lacking, a trial court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties. See *Permian Power Tong, Inc.* v. *Diamondback E&P, LLC*, 550 S.W.3d 642, 663 (Tex. App.—Tyler 2017, pet. denied), (citing *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.)) Taking this principle to its logical conclusion, the Austin Court of Appeals upheld a trial court’s fees award in the face of a legal insufficiency challenge where the record contained no evidence of any of the relevant *Arthur Andersen* factors, just time spent and total amount of fees, but, at the hearing, the trial court stated:

> I mean, I know, I realize y’all both practice law and you charge this amount of money and you spent this amount of time. So unless either of y’all are going to have an excruciating cross-examination of each other, just state what time you’ve spent and what you feel would be an appropriate amount in this case.


Likewise, a failure to submit resumes on all of the timekeepers is not fatal. Rejecting the appellant’s complaint that only the lead counsel had introduced his resume, the Tyler Court of Appeals declared: “we are unaware of a specific requirement that the résumés of all attorneys and paralegals within a firm be attached to an affidavit.” *Permian Power Tong*, 2017 Tex. App. at 663 (citing *Hagedorn*, 73 S.W.3d at 341 and *John Moore Servs., Inc.* v. *Better Bus. Bureau of Metro. Houston Inc.*, No. 01-14-00906-CV, 2016 Tex. App. LEXIS 5814, at *1, 7 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.) (implicitly holding that resume of lead attorney was sufficient).

2. **Bare Minimum Proof: Describe Services Provided, Who Performed, When, How Much Time, And Hourly Rate**

The Texarkana Court of Appeals has recognized what constitutes the bare minimum proof to recover under the traditional, *Arthur Andersen* methodology.

While *Arthur Andersen* set forth factors that should be considered by the fact-finder, the court “did not mandate that such evidence must be admitted or considered.” *Robertson Cty. v. Wymola*, 17 S.W.3d 334, 345 (Tex. App.—Austin 2000, pet. denied); see Tex. Disciplinary R. Prof. Conduct 1.04 (discussing factors that “may be considered”). Thus, “[a] trial court is not required to receive evidence on each of these factors.” *Eitel v.*

Daily v. McMillan, 531 S.W.3d 822, 827 (Tex. App.—Texarkana 2017, no pet.) (emphasis added). See also Finserv Cas. Corp. v. Transamerica Life Ins. Co., 523 S.W.3d 129 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (despite complaints that the contemporaneous billing records (the firm’s monthly statements) included block billing, heavy redaction, vague entries, clerical work, and duplicative tasks, the Fourteenth Court of Appeals found that the records contained the type of service provided, the name of the attorney providing the service, the date the service was performed, the hourly rate, and how much time the work required, which met the Texas Supreme Court’s articulated bare minimum standard for evidence of the services performed, who performed them, at what hourly rate, when they were performed, and how much time the work required).

Both the Daily v. McMillan and Finserv Cas. Corp. decisions never mentioned lodestar, yet the bare minimum requirements are strikingly similar.

C. No One Factor Determinative

As noted in Section IV. Prevailing Party D. Amount Recovered Less Than Tendered or Sought at Trial Does Not Matter, Still Prevailing Party, supra. at p. 31, the plaintiff’s recovery is often less than what was demanded in the tender or sought at trial. This is one of the Arthur Andersen and Johnson factors. However, federal courts rarely reduce fees solely due to a discrepancy between what is sought and recovered. In rejecting such a demand, the court in Tech Pharmacy explained:

The Fifth Circuit has instructed that “while the district court must take the degree of success obtained into account, it would be an abuse of discretion for the district court to reduce . . . [an] attorney’s fee award solely on the basis of the amount of damages obtained.” Black, 732 F.3d at 503; see also Saizan v. Delta Concrete Prods. Co., 448 F.3d 795, 799 (5th Cir. 2006) (“While a low damages award is one factor which the court may consider in setting the amount of fees, this factor alone should not lead the court to reduce a fee award.”). Defendants ask for this reduction simply because Tech Pharmacy recovered less than they requested. As such, the Court will not reduce the fee award based solely on the amount of damages Tech Pharmacy obtained.

D. Electing the Lodestar Method

In \textit{Helms v. Swansen}, the Tyler Court of Appeals compiled cases assessing whether an attorney’s introduction of his total hours and hourly rate resulted in an election of using the lodestar method or the “traditional” method (i.e. the \textit{Arthur Andersen} factors alone). See No. 12-14-00280-CV, 2016 Tex. App. LEXIS 4540 *19-21 (Tex. App.—Tyler 2016, pet. denied) (mem. op.). On what appear to be described as similar facts, half the cases held that the attorney had elected lodestar and half concluded the attorney was using the “traditional,” non-lodestar method. See also \textit{R2 Rests., Inc. v. Mineola Cmty. Bank, SSB}, 561 S.W.3d 642, 660-62 (App.—Tyler July 25, 2018, pet. denied) (compiling cases of election and non-election, determining that the applicant had elected the lodestar method based solely on references to her hourly rate, and finding that applicant had failed to present adequate proof (neither adequate testimony nor contemporaneous billing record)).

And, the confusion continues. See \textit{In the Interest of K.T.P.}, No. 05-17-00922-CV, 2018 Tex. App. LEXIS 10752, at *14-17 (Tex. App.—Dallas Dec. 21, 2018, no pet.) (mem. op.). In that case the Dallas Court of Appeals held that “[b]y referring to hourly rates, it is apparent Mother’s counsel is using the lodestar method of calculating attorney’s fees.” \textit{Id.} at 15. The court then found that the Mother’s counsel’s affidavit was deficient for failing to include “evidence of the work performed, who performed it and at what hourly rate, when the work was performed, and how much time the work required.” \textit{Id.} at *16-17. The court also noted that contemporaneous billing records were supposedly served on Father’s counsel, but did not make it into the record. \textit{Id.} at *16. The appellate court therefore reversed and remanded the fee award back to the trial court.

On the other side of the equation is \textit{Propel Fin. Servs., LLC v. Perez}, No. 01-17-00682-CV, 2018 Tex. App. LEXIS 5792, at *9-10 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem. op.) (citing cases holding that merely stating the applicants hourly rate, number of hours worked, and total fees do not elect lodestar).

Technically, lodestar is a two step process:

Using the lodestar analysis, the computation of a reasonable attorneys’ fee award is a two-step process. \textit{El Apple}, 370 S.W.3d at 760 (citing \textit{Dillard Dep’t Stores, Inc. v. Gonzales}, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied)). First, courts determine the reasonable hours spent by counsel and a reasonable hourly rate, and then multiplies the two together to get the base fee or lodestar. \textit{Id.} (citing \textit{Gonzales}, 72 S.W.3d at 412). Second, courts adjust the lodestar up or down based on relevant factors, found in \textit{Johnson v. Georgia Highway Express, Inc.}, 488 F.2d 714 (5th Cir. 1974). [Factors omitted] ... \textit{Gonzales}, 72 S.W.3d at 412 (citing \textit{Johnson}, 488 F.2d at 717-19). “If some of these factors are accounted for in the lodestar amount, they should not be considered when making adjustments.” \textit{Id.} (citing \textit{Guity v. C.C.I. Enter., Co.}, 54 S.W.3d 526, 529 (Tex. App.—Houston [1st Dist.] 2001, no pet.)).

(acknowledging the two step process and noting that the lodestar indicia are non-exclusive and any adjustment selected by the trial court may range from 25% to 400% of the base fee, up or down.) Admittedly, while downward adjustments are common, upward adjustment seem to be extraordinarily rare. Two Texas cases actually applying a multiplier are: (1) Anani v. Abuzaid, No. 05-16-01364-CV, 2018 Tex. App. LEXIS 4141, at *31-33 (Tex. App.—Dallas June 7, 2018, no pet. h.) (mem. op.) (applying a 2.0 multiplier to one of four sets of attorneys representing plaintiff) and (2) E.F. Johnson Co. v. Infinity Glob. Tech., No. 05-14-01209-CV, 2016 Tex. App. LEXIS 8795, at *37-42 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op.) (applying a 1.5 multiplier). 28

1. Lodestar Presumptively Produces a Reasonable Fee

Although specifically discussing whether a multiplier was properly applied to a class action fee, the Texas Supreme Court recognized in El Apple I that lodestar presumptively produces a reasonable rate. El Apple I, 370 S.W.3d at 765. See also United Parcel Service, Inc. v. Rankin, 468 S.W.3d 609, 628 (Tex. App.—San Antonio 2015, pet. denied) (a personal injury case awarding attorneys’ fees under an offer of judgment pursuant to Texas Civil Practice and Remedies Code section 42.004(a) and following El Apple I’s holding that lodestar presumptively produces a reasonable rate). Federal courts go even further, recognizing a “strong presumption” that the lodestar amount is reasonable, and it should only be those “rare circumstances” in which the lodestar method does not adequately reflect a reasonable fee. Reyelts v. Cross, 968 F. Supp. 2d 835, 850 (N.D. Tex. 2013) (citing Perdue v. Kenny A., 559 U.S. 542 (2010)). 29

Sullivan explained:

One other step remains which permits the trial court to adjust the base lodestar “up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.” 27 Id. The relevant factors include such things as (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill needed to perform the legal service properly; (4) the likelihood that the work will preclude other employment by the lawyer; (5) the fee customarily charged in the locality for similar legal services; (6) the amount involved and the results obtained; (7) the time limitations imposed by the client or by the circumstances; (8) the nature and length of the professional relationship with the client; (9) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (10) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. See id. at 761 (citing Tex. Disciplinary R. Prof’l Conduct R. 1.04(b), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (West 2013), and Arthur Andersen, 945 S.W.2d at 818).

2018 Tex. App. LEXIS 1196 at *16-17.

28 One other upward adjustment has been recognized for delay in recovery. In Thomason, the trial court rejected plaintiff’s counsel’s request for a “delay enhancer” as most of his fees were earned at least 14 months earlier due to an appeal to the Fifth Circuit. See Thomason v. Metro. Life Ins. Co., Civil Action No. 3:14-CV-86-K, 2018 U.S. Dist. LEXIS 35801, at *11 (N.D. Tex. 2018) (citing cases granting delay enhancement for cases in which the delay was 6, 7, or 10 to 15 years between rendition of services and the ultimate recovery.) In addition to enhancement, plaintiff’s can seek pre-judgment interest on attorneys’ fees that have actually been paid. See Section VII. Miscellaneous, C. No Pre-Judgment Interest, Unless Fees Have Already Been Paid, infra. at 118.

29 The Reyelts Court ultimately determined that it was one of those rare cases in which lodestar led to an excessive fee.
(a) PRACTICE POINTER: Beware Electing Lodestar without Knowing It

Given the uncertainty and the effects of not fully developing all the elements of lodestar, we certainly recommend you err on the side of caution and submit proof of all lodestar factors. If your opponent is submitting fees, ask if it is using lodestar. If so, be sure to object if it does not present all lodestar required proof, like contemporaneous billing records (or some reasonable facsimile thereof).

(b) PRACTICE POINTER: Lodestar Reward Outweighs Burden

Although electing lodestar might create a slightly greater evidentiary burden, it is worth undertaking to get a presumptively reasonable rate. This is particularly true when all the opposing party does is cross-examine your attorneys’ fees expert instead of putting on affirmative proof to the contrary. Additionally, if you already have a timekeeping system, the burden of producing contemporaneous records that satisfy lodestar is minimal. Given the potential benefit and the minimal burden, why would you not pursue the lodestar method?

E. Proceeding under the Traditional Method (Rejecting Lodestar)

“Neither El Apple nor Long stands for the proposition that all attorney’s fees recoveries in Texas are governed by the lodestar approach.” Propel Fin. Servs., LLC v. Perez, No. 01-17-00682-CV, 2018 Tex. App. LEXIS 5792, at *9 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem. op.) (citing numerous cases continuing to recognize the viability of the traditional method).

1. Flat Fee Cases

Propel Financial was predominantly a flat fee case, which is particularly appropriate for a traditional method approach. The Houston First Court of Appeals specifically quoted Texas Disciplinary Rule of Professional Conduct 1.04, comment 3, which recognizes flat fee arrangements are one of the common methods historically employed by lawyers. (Notably, Rule 1.04 contains the list of factors adopted by Arthur Andersen.) Id. at *12. The case also involves a good discussion of factors to prove up the reasonableness of flat fees, including the presumption that these are “based on an agreement between client and law firm for the amount to be charged for certain repeated tasks undertaken by the firm.” Id. at *10-15. Likewise, the court recognized that “such arrangements are not disfavored, particularly when they are between a law firm and a client of long standing.” Id. at *12.

2. PRACTICE POINTER

If you intend to proceed under the traditional method, (1) state this affirmatively, (2) specifically state that you are not electing and are indeed rejecting lodestar, and then (3) cite Propel Financial and cases cited therein supporting your right to do so. Keep in mind, for larger cases with substantial hourly work performed and fees charged, the presumption is that you must use lodestar, not the traditional method.
F. Reasonable Hourly Rate

Under Arthur Andersen and lodestar, a reasonable hourly rate is the foundation for establishing an award. In Tech Pharmacy, the trial court rejected the defendants’ argument that the reasonable rate should be evaluated based on the reasonable rate in the community for breach of contract cases, because that was the only cause of action on which Tech Pharmacy prevailed on at trial. Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *25 (E.D. Tex. 2017). Tech Pharmacy was a case litigated in Sherman by national firms on both sides at which Tech Pharmacy sought $860 per hour for its lead counsel’s partners, $631 for its lead counsel’s associates, and $275 for its lead counsel’s paralegals and $600 for its local counsel’s partner, $450 for its local counsel’s associates, and $150 for its local counsel’s paralegals, all of which is likely far greater than the hourly rate of most attorneys trying breach of contract cases in Sherman. 30 Id. at *25. In rejecting the defendants’ argument and concluding these were reasonable hourly rates, the trial court declared:

The case law suggests that “[t]he reasonable hourly rate is the rate ‘prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.’” BMO Harris Bank, N.A. v. RidgeAire, Inc., 2014 U.S. Dist. LEXIS 196584, 2014 WL 12612803, at *1 (E.D. Tex. June 4, 2014) (quoting Blum v. Stenson, 465 U.S. 886, 888, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)). “Similar services” is not limited to the prevailing claim. This case was never a simple contract case. This is a case with close to 400 docket entries, several dispositive and discovery motions, and a three-week jury trial. Tech Pharmacy sued Defendants not only for breach of contract, but also for patent infringement, misappropriation of trade secrets, fraud, and equitable estoppel. The services that Tech Pharmacy's attorneys provided were for all of these claims, not just for the breach of contract claim. As such, the Court will look to evidence regarding fees in similar cases offering similar services.

Id. at *25-26. The trial court also noted that Tech Pharmacy’s attorneys’ fees expert relied on the 2015 American Intellectual Property Law Association31 Report of the Economic Survey and testified that the complexity of the case that a large, national firm was necessary for adequate representation and such firms tend to run on the higher end of what is reasonable. Id. at *26-27. So, in assessing the reasonable hourly rate, the court may look at the entirety of the litigation, not merely the prevailing claim, and determine the level of sophistication required to handle it.


However, the Amarillo Court of Appeals questioned a blended hourly rate of $385 per hour, much less the attorney rates of $405 and $530 per hour charged in Sullivan’s counsel’s major urban

30 The lead counsel was a national firm; however, the local counsel’s firm only has offices in Tyler and Marshall.

31 For a much broader survey of fees in Texas, see the State Bar survey discussed in Section VII. Miscellaneous, P. State Bar Fees Survey for Proving Usual and Customary Rates infra at p. 126. Notably, the rates in the State Bar survey are likely to be much lower than in the AIPLA survey.
offices for litigation in the West Texas Panhandle county of Hemphill. *See Sullivan v. Abraham*, No. 07-17-00125-CV, 2018 Tex. App. LEXIS 1196 at *17-28 (Tex. App.—Amarillo Feb. 13, 2018, no pet.) (“Needless to say, neither the West Texas Panhandle nor the county of suit (Hemphill) are Houston, Dallas, San Antonio, Austin, or some other expanding metropolitan area.”) Abraham’s counsel, who practiced in the West Texas Panhandle, provided controverting proof that in that area partners billed between $275-375 per hour and associates $180-200 for this type of work. *Id.* at *22. Sullivan involved the Texas Citizens Participation Act, § 27.009. Had it involved Chapter 38, the Amarillo Court of Appeals recognized that the trial court could have taken judicial notice, even doing so sua sponte, of the fees charged in the locality. *Id.* at *23, Fn. 9 (citing Charette v. Fitzgerald, 213 S.W.3d 505, 514-15 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (so holding while also noting there to be a split of authority on the issue)). Arguably, the difference between *Tech Pharmacy* and *Sullivan* can be reconciled by *Tech Pharmacy* focusing on the sophistication of the work more than the locality and *Sullivan* looking more to the locality.

On the other hand, *Sullivan* also criticized the trial court for awarding a fee that worked out to $46.68 per hour for the 753 hours worked (where the number of hours was not controverted) or, viewed differently, for only 91 of those 753 hours if the requested rate was applied. *Id.* at *17-18. Either way, the Amarillo Court of Appeals remanded the case to the trial court for second time (the third time for the trial court to consider fees).32 The Amarillo Court of Appeals also questioned why six attorneys were needed on Sullivan’s appeal. *Id.* at *19. Finally, the court repeatedly compared Sullivan’s attorneys’ hours and rates to Abraham’s attorney’s hours and rates (a comparison that did not favor Sullivan in his fee application.)

**G. Contingency Fees Not Necessarily Precluded As Unreasonable**

The Texas Supreme Court has ruled that “the plaintiff cannot simply ask the jury to award a percentage of the recovery as a fee because without evidence of the factors identified in Disciplinary Rule 1.04, the jury has no meaningful way to determine if the fees were in fact reasonable and necessary.” *Arthur Andersen*, 945 S.W. 2d at 818-19. *See also McKeithan v. Condit*, No. 13-10-00226-CV, 2013 Tex. App. LEXIS 15204, at *30-32 N. 8 (App.—Corpus Christi Dec. 19, 2013, no pet.) (mem. op.) (holding that awarding attorneys’ fees using a contingency-fee formula is not allowed and compiling cases so holding).

However, *Arthur Andersen* Factor No. 8 expressly references contingency fees and the language of the opinion merely prohibits awarding a fee based “simply” on the request for a percentage of the damages; courts have recognized that contingency fees can be reasonable if properly proven. The First Court of Appeals, rejecting the defendant’s argument that a contingency fee may never be a reasonable basis for an attorneys’ fees award, analyzed the state of the law as follows:

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32 The Amarillo Court of Appeals noted that the multiple supplemental fee affidavits led to considerable internal inconsistency in Sullivan’s fee application. *Id.* at *18. If you file multiple applications or affidavits (1) check them thoroughly to avoid internal contradictions; and (2) if such internal inconsistencies cannot be avoided, consider making your subsequent applications or affidavit an amendment, not a supplementation, so you can try to preclude reference to the first and then address the inconsistency head on and explain why your were estimates or calculations were off on the original application or affidavit and why the actual time was so much more.
Alsheikh cites *Arthur Andersen*, in which the Texas Supreme Court states, “[W]e cannot agree that the mere fact that a party and a lawyer have agreed to a contingent fee means that the fee arrangement is in and of itself reasonable for purposes of shifting that fee to the defendant.” *Arthur Andersen*, 945 S.W.2d at 818-19. We agree with the Texas Supreme Court that the existence of a contingency-fee arrangement does not, by itself, make the fee reasonable for purposes of fee shifting. However, when the *Arthur Andersen* factors are met, the award of attorneys’ fees on a contingent basis may be appropriate. See *Transcon. Gas Pipeline v. Texaco*, 35 S.W.3d 658, 675-76 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (holding award of attorneys’ fees on contingency basis was reasonable based on *Arthur Andersen* factors); see also *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 870 (Tex. App.—Fort Worth 2001, pet. denied) (same).


Proving up a contingency fee using the *Arthur Andersen* factors has many pitfalls and risks. For instance, in *Wythe II Corp. v. Stone*, the plaintiff simply failed to provide adequate proof. See 342 S.W.3d 96, 106-108 (Tex. App.—Beaumont 2011, pet. denied), cert. denied, 565 U.S. 1179 (2012). The case reflects the need to present more than just evidence of the contingency fee contract, that its percentage was usual and customary in Beaumont, and the estimated hours worked on the case. The Beaumont Court of Appeals found this evidence lacking and remanded for a new trial. The court concluded: “The evidence offered by Stone to support the other *Arthur Andersen* factors does not provide sufficient justification for shifting the entire amount of the contingent fee to Wythe.”

Likewise, while theoretically possible to support a request for a contingency fee with adequate discussion of the *Arthur Andersen* factors, the practical reality makes recovering a full contingency fee difficult when the time on the matter multiplied by the hourly rate does not come close to the contingency fee amount. See *Sharma v. Khan*, No. 14-17-00322-CV, 2018 Tex. App. LEXIS 6457, at *24 (Tex. App.—Houston [14th Dist.] Aug. 16, 2018, no pet.) (mem. op.). In that breach of contract case, the plaintiff tried to establish that the 40% contingency fee of $520,000 was reasonable, particularly stressing that the uncertainty of collecting from the bankrupt defendant; however, acknowledging a rate of between $450 and $600 per hour and having worked between 90-130 total hours [mathematically equaling at most $78,000]. Defense counsel testified that the

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33 Plaintiffs’ counsel provided the following testimony on the *Arthur Andersen* factors:

The Sharmas argue they “adduced uncontroverted testimony” from Mahendru that (1) the risk of not collecting on their claim for breach of the settlement agreement was “extremely high;” (2) Mahendru’s law firm could take the case only on contingency because the Sharmas had no money to pay attorney’s fees; (3) Mahendru worked under significant time constraints; (4) the “seemingly simple nature” of the breach of settlement agreement claim required significant time and labor and the hiring of a bankruptcy attorney; (5) Mahendru’s “firm may have been precluded from accepting other employment due to the time commitments associated with accepting a case pending in Fort Bend County District Court, which is a two-hour round trip drive from his office, and which, unfortunately, usually requires a full day for a single hearing;” (6) a 40 percent contingency fee is customary in Harris and Fort Bend County; (7) “the ‘amount involved’ in the litigation was high;” and (8) the Mahendru law firm is known for its exceptional reputation and ability in Harris and Fort Bend County.
contingency fee was not reasonable, the stated hours seemed high, and the risk of collection was perhaps not at high as plaintiffs asserted. The Houston Fourteenth Court of Appeals upheld the trial court’s award of $38,250 finding that plaintiffs had failed to provide uncontroverted testimony on factors one (time and labor required/skill/novelty), three (fee customarily charged), and eight (collection uncertainty) and further noting that the factfinder was not required to award the full amount of uncontroverted fees. *Id.* at *15-16 and *24-25.

Even if the claimant supports his claim for attorneys’ fees with a percentage contingency fee, he must obtain a finding in dollars and cents and some courts have used the verbiage that he must “ask” for a specific amount. *See Ohrt v. Union Gas Corp.*, 398 S.W.3d 315, 333 (Tex. App.—Corpus Christi 2012, pet. denied). *See also Wythe II Corp. v. Stone*, 342 S.W.3d at 107. It is unclear to the authors whether the term “ask” means he must (a) submit a jury question seeking dollars and cents or (b) state an amount in closing argument. One would think if the claimant has submitted a jury question seeking dollars and cents, that should suffice. However, to be safe, one might wish to do the math on closing argument.

Finally, “if damages are reduced, attorneys’ fees should ordinarily be retried unless the appellate court is ‘reasonably certain that the jury was not significantly influenced by the erroneous [damage award].’” *Dana Corp. v. Microtherm, Inc.*, No. 13-05-00281-CV, 2010 Tex. App. LEXIS 408, at *73 (Tex. App.—Corpus Christi Jan. 21, 2010, pet. granted, judgm't vacated w.r.m.) (mem. op.) (quoting *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006)).

However, oral contingency fees are prohibited. *See generally Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724 (Tex. 2018). In *Hill*, although Texas Government Code § 82.065(e) was inapplicable based on the timing of the services provided, the common law has provided for quantum-meruit recoveries for attorneys who did not have written contingent-fee agreements that complied with the statute. *Id.* at 732-35. However, Shamoun’s attorneys’ fees expert’s opinion improperly equated the reasonable value of Shamoun’s services to the value provided in the oral contingency fee. *Id.* at 740-41. When the attorney has performed services under an alleged contingent-fee agreement prohibited by the statute of frauds but has provided value to the client, the alleged contingent-fee agreement is no evidence of the “reasonableness” of the value of the attorney’s services. *Id.* at 744.

However, certain statutes may preclude recovery under a contingency fee agreement. *See MacFarland v. Le-Vel Brands LLC*, No. 05-17-00968-CV, 2018 Tex. App. LEXIS 3386, at *6-17

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*Id.* at *9-10.

34 In reversing the court of appeals’ decision, the Texas Supreme Court took away a $48,000 an hour fee.

35 Texas Government Code § 82.065 is a specific statute of frauds for legal services requiring contingency fee agreements to be in writing and signed by the client. Effective September 1, 2011, the statute added a provision, subsection (c), specifically recognizing that, where the statute prohibited a contingency fee, the attorney could recover based on a quantum meruit theory. Shamoun’s services were provided in 2010. The statute also prohibits certain contracts obtained through barratry in subsection (b).

36 Shamoun had four written contracts for hourly work for related services. Shamoun was permitted to recover for the fifth contract’s (the prohibited contingency fee contract) because “the existence of an express contract does not preclude recovery in quantum meruit for the reasonable value of work performed and accepted which is not covered by an express contract.” *Id.* at 737-38.
1. PRACTICE POINTER: Proving a Contingency Fee

If you are a claimant and intend to seek your contingency fee as the quantum for your fee, you must produce substantial evidence on the Arthur Andersen factors. You should explain the merits of and benefits to your client of a contingency fee arrangement. You should have your client prepared to explain why he selected it. You should even consider keeping and introducing your contemporaneous time records.

2. PRACTICE POINTER: Jury Getting Close to Lodestar

In the authors’ opinion and strictly as a practical matter, a contingency fee is more likely to be approved if it is within ±50% of lodestar with adequate support of each of the Arthur Andersen factors; however, except in unusual circumstance requiring substantial evidence of same, seeking recovery of 5-10 times the work performed is likely not going to survive appellate review.

3. PRACTICE POINTER: If Damages Reduced, Offer Remittitur

So, if you have argued for a contingent fee and your damages are reversed, you must also retry attorneys’ fees, although you might consider a voluntary remittitur. However, if you go with a hourly request, whether proven by the traditional method or lodestar, you have a better chance of persuading the appellate court that the attorneys’ fees award should stand.

H. Fees Not Paid, in Whole or in Part, or Paid by Third Party Still Recoverable

As a logical extension of contingency fees (other than in TCPA or similar statutes requiring the fees be “incurred”), the courts do not require that the plaintiff pay the attorneys’ fees in order to recover them. In Serralde v. Flores, the appellant argued that the appellee had not paid its attorneys; rather, such bills had either been paid by a third party or simply not been paid. No. 04-17-00078-CV, 2018 Tex. App. LEXIS 1344 at *12-13 (Tex. App.—San Antonio Feb. 21, 2018, no pet.). The San Antonio Court of Appeals brushed aside this argument stating, “Generally, when a party prevails on a breach of contract claim, the party’s failure to actually pay their attorney is not a bar to recovery of reasonable attorney’s fees.” Id. at *13 (citing Rauscher Pierce Refsnes, Inc. v. Koenig, 794 S.W.2d 514, 516 (Tex. App.—Corpus Christi 1990, writ denied) (a contingency fee case).

Similarly, in what was effectively a discounted rate, the Houston 14th Court of Appeals reached a similar conclusion based on a what the court noted to be a novel provision in an attorneys’ fees contract whereby the client agreed and noted that the attorneys’ hourly rate that would be sought from the jury would be $500, but that the client would only be require the client to pay $350. See Van Dyke v. Builders W., Inc., 565 S.W.3d 336, 339 (Tex. App.—Houston [14th Dist.] 2018, pet.
At trial, the defendant did not object to the hourly rate as unreasonable; rather, he objected that the $500 hourly rate had not been actually incurred. After reviewing case law, the Houston 14th Court of Appeals found that Chapter 38 does not expressly require that the fees awarded being incurred, but only that the fees be proven to be reasonable and necessary. *Id.* at 345-346.

1. **Practice Pointer: Discounted Rates**

If you offer your client a discounted rate and intend to seek to be awarded the full, undiscounted rate, consider adding a similar provision to that found in *Van Dyke* to your retention agreement. If your opposing party seeks its full, undiscounted rate, then you should object to the reasonableness of the full, undiscounted hourly rate and present evidence that the discounted rate is reasonable.

I. **Contemporaneous Billing Records: Traditional vs. Lodestar**

1. **Traditional Method Does Not Require Documentation**

Traditionally, an attorney may prove up reasonable attorneys’ fees by testifying, live or by affidavit, to the eight *Arthur Andersen* factors (or such of them as are appropriate). The attorney did not have to introduce contemporaneous billing records. The Texas Supreme Court did not dispute this interpretation of the claimant’s burden of proof under traditional Texas attorneys’ fees jurisprudence. *See El Apple I*, 370 S.W.3d at 761-62.

Lower courts have also upheld this interpretation of the claimant’s burden of proof under the traditional method. For instance, the Fort Worth Court of Appeals rejected the appellant’s argument that the claimant’s attorneys’ fees claim must be reversed due to the claimant’s failure to introduce contemporaneous billing records or other documentary evidence. *Ferrant v. Graham Assocs.*, No. 02-12-00190-CV, 2014 Tex. App. LEXIS 4984, at *20 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.) (compiling cases standing for the proposition that *El Apple* does not require admission of hourly time records in all cases). The Fort Worth Court of Appeals concluded: “We do not read *El Apple* to mean that evidence of attorney’s fees is legally insufficient in an ordinary, non-lodestar, hourly-fee breach of contract case unless contemporaneous time records are admitted into evidence.” *Id.* at *21-22. *See also Brand v. Degrate-Greer*, No. 02-15-00397-CV, 2017 Tex. App. LEXIS 4082, at *22-23 (App.—Fort Worth May 4, 2017, no pet.) (mem. op.) (relying on *Ferrant* to reject the appellant’s argument that the claimant’s attorneys’ fees claim had to be supported by documentary evidence; rather, the claimant’s counsel’s testimony “about his experience, his hourly rate, the reasonableness of his fee, the amount of time he spent on the case, and why he had to spend more time on this case than he normally would have spent on a case of

37 The precise language of the contract read:

> Even though we are charging $500 per hour for our attorney time, we are agreeing to seek payment from Builders West for only $350 per hour. We will seek to have the jury and/or judge award Builders West the entire $500 per hour fee from Scott Van Dyke. If and when Builders West is awarded and paid more than $350 per hour for our legal fees, Builders West agrees to pay to RH&A any award for RH&A fees over $350 per hour, and $350 per hour will be apportioned to Builders West to make the company whole for those amounts already paid to RH&A.

*Id.* at 345.
this nature” was sufficient to support the trial court’s award of attorney’s fees for an ordinary, non-lodestar breach of contract case; Nathan Halsey & Bonamour Pac., Inc. v. Halter, 486 S.W.3d 184, 187 (Tex. App.—Dallas 2016, no pet.) (which has a section entitled “[d]oes § 38.001 require written evidence” that succinctly summarizes the cases supporting the argument that it does not, even for lodestar cases); Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 846 (Tex. App.—Dallas 2014) aff’d in part, rev’d in part, 544 S.W.3d 724 (Tex. 2018)) (a Chapter 38 case in which the Dallas Court of Appeals held: “Texas law does not require detailed billing records or other documentary evidence as a prerequisite to awarding attorneys’ fees. ‘It has consistently been held that an attorney’s testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award.’” (quoting Metroplex Mailing Servs., L.L.C. and Jesse R. Marion v. RR Donnelley & Sons Co., 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.)); and Barnett v. Schiro, 38 No. 05-16-00999-CV, 2018 Tex. App. LEXIS 235 at *26-28 (Tex. App.—Dallas Jan. 9, 2018, pet. filed), rev’d, 2019 Tex. LEXIS 386 (Tex. Apr. 26, 2019) (in which the plaintiff’s attorneys’ fees expert produced all of his contemporaneous billing records in discovery, but did not introduce them as evidence and testified relying on summary of those record, which was not provided to defendant’s counsel, and the court held that “[i]n a non-lodestar case, ‘an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award.’” (quoting J & K Tile Co. v. Aramco Inc., No. 05-15-01065-CV, 2016 Tex. App. LEXIS 11942, 2016 WL 6835717, at *3 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.) in turn quoting Classic Superoof LLC v. Bean, No. 05-12-00941-CV, 2014 Tex. App. LEXIS 11365, 2014 WL 5141660, at *9 (Tex. App.—Dallas Oct. 14, 2014, pet. denied) (mem. op.)).

Contingency fee applications are merely a subset of the traditional method. The Texas Supreme Court in Long v. Griffin hypothetically assumed that supporting evidence was not necessary in a contingency fee application, but did not resolve the issue as the ultimate award in the case did not result in any damages from which to take a contingency fees. See 442 S.W.3d at 256.

2. Lodestar Method Usually Requires Documentary Evidence

However, El Apple I distinguished traditional cases from those in which the claimant utilized the lodestar method. After reviewing the four principal criteria for establishing lodestar, the Texas Supreme Court declared:

38 On April 26, 2019, the Texas Supreme Court delivered Rohrmoos Venture v. UTSW DVA Healthcare, LLP, No. 16-0006, 2019 Tex. LEXIS 389 (Apr. 26, 2019), which discussed in detail the adequacy of attorneys’ fees proof. As a result, it reversed and remanded this case in a per curium opinion for the Dallas Court of Appeals to reconsider its ruling in light of Rohrmoos Ventures. Reportedly, Barnett intends to seek a rehearing.

39 In his petition for review, Barnett has challenged this line of cases. He proposed that the Texas Supreme Court should find that attorneys’ fees must be supported by contemporaneous billing records. He also challenged the traditional remand instead of rendition where the attorneys’ fees proof is lacking. Specifically, Barnett asserts: “It is time for this Court to reconsider its discriminatory policy of treating attorneys as a special class of expert witness deserving of a second bite at the apple on remand when their testimony on fees is held to be legally insufficient.” Barnett has drawn an amicus letter brief in support of these two points. The three page amicus is attached as Appendix C. Notably, by failing to file a motion for new trial, Barnett failed to preserve his factual insufficiency point. Accordingly, he is limited to a legal insufficiency challenge.
In all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.

El Apple I, 370 S.W.3d at 763. “Building on the holding in El Apple, the Texas Supreme Court later held that bare testimony from an attorney, absent written records of itemized times, tasks, and rates charged, amounted to insufficient evidence to prove reasonable attorneys’ fees under lodestar.” Total E&P USA, Inc. v. Mo-Vac Servs. Co., No. 13-15-00348-CV, 2017 Tex. App. LEXIS 7061, at *15 (App.—Corpus Christi July 27, 2017, pet. denied) (mem. op.) (citing City of Laredo v. Montano, 414 S.W.3d 731, 736 (Tex. 2013, no pet.)). In Total E&P USA, the Corpus Christi Court of Appeals found that, while arguably not contemporaneous billing records, “a 22-page written spreadsheet of specific dates, hours, and billing rate entries of numerous legal tasks performed” along with supporting testimony was sufficient. See id. at *16-17.

The Fourteenth Court of Appeals, picking up on different language in El Apple I and City of Laredo, leaves open the possibility of proving up attorneys’ fees through lodestar without introducing contemporaneous billing records or other evidence. See Guardian Transfer & Storage, Inc. v. Behrndt, No. 14-14-00635-CV, 2016 Tex. App. LEXIS 3297 (Tex. App.—Houston [14th Dist.] Mar. 31, 2016, no pet.) (mem. op.). Contrary to Behr Construction’s assertion, El Apple does not completely foreclose the possibility of an attorney’s fee award absent evidence of contemporaneous time records. See id. at 763; see also City of Laredo v. Montano, 414 S.W.3d 731, 736 (Tex. 2013) (“El Apple does not hold that a lodestar fee can only be established through time records or billing statements. We said instead that an attorney could testify to the details of his work, but that . . . ‘the attorney would probably have to refer to some type of record or documentation to provide this information.’”); River Oaks L-M. Inc. v. Vinton-Duarte, 469 S.W.3d 213, 233 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affidavit in support of attorney’s fees claim which stated that actual time records had not been kept but that attorney conducted a “forensic review” of the firm’s files satisfied El Apple requirements). Accordingly, we reject Behr Construction’s argument that the attorney’s fees award in this case is not supported by evidence because Guardian’s attorney did not testify that “he based his opinion on contemporaneous records.”

Id. at *38. We would note that the decision is not entirely clear that Guardian Transfer’s counsel attempted to use the lodestar method. We would also note that he testified to only 100 hours prior to trial. Arguably, that qualifies under El Apple I as the simplest of cases, which would exempt it from the contemporaneous billing record requirement. Finally, we would note that Total E&P USA references the Texas Supreme Court’s analysis of Gonzales’s fees in City of Laredo while Guardian Transfer cites to language likely setting up the Texas Supreme Court’s decision regarding Benavides-Maddox’s fees. The contrast in the two attorneys’ work and testimony supporting their claims results in the differing decisions. Gonzales claimed over 1,300 hours while Benavides-Maddox only 60. Gonzales was working on a contingency fee agreement and had not sent a bill or been paid while Benavides-Maddox had been paid. Gonzales admitted he kept no
records of his time; however, he “conceded that had he been billing his client he would have itemized his work and provided this information. A similar effort should be made when an adversary is asked to pay instead of the client.” City of Laredo, 414 S.W.3d at 736 (citing El Apple I, 370 S.W.3d at 762).

As discussed in subsection (f) below, an applicant can also attempt to “reconstruct” his time.

(a) PRACTICE POINTER: Cases Exceeding 100 Hours Should Provide Contemporaneous Billing Records—Cures Many Deficiencies

Attaching contemporaneous billing records solves a number of potential problems and overcomes many inadequacies, whether you think you are proving up by the traditional method (including contingency fees) or lodestar. The jury, court, and court of appeals can all consider the information in the contemporaneous billing records. This can fill in many little gaps in your proof, even in the smallest, simplest of cases. Unless you have a really good reason for not attaching them to your affidavit or introducing them at trial, you should provide your own contemporaneous billing records. Of course, if you do not, you can compare yourself to Benavides-Maddox in City of Laredo; however, remember that she sent bills and was paid for her work. Courts and juries are predisposed to find paid bills reasonable under most circumstances.

(b) PRACTICE POINTER: Contemporaneous Billing Records Allow Ability to Segregate

Introducing contemporaneous billing records may also help when it comes to segregating fees. See generally United Services Automobile Association v. Hayes, 507 S.W.3d 263, 283-84 (Tex. App.—Houston. [1st Dist.] 2016, pet. granted, judgm’t vacated w.r.m.). While the Hayeses’ attorney submitted a “fee recap” (presumably a summary of contemporaneously recorded time), it did not contain any sort of reduction or segregation of time for causes of action for which attorneys’ fees are not recoverable. This was just one of many issues leading to a remand on attorneys’ fees. Conversely, in Brinson Benefits, Inc. v. Hooper, 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.) the prevailing parties’ attorney supported his application for attorneys’ fees with a four page affidavit to which he attached over 50 pages of contemporaneous time entries. Attaching your contemporaneous time entries, redacted as need be (but not so much as to make them useless as supporting evidence), can cure any number of issues. Here the court noted that these records allowed it to assess segregability of fees. Conversely, if you are the debtor/defendant and the claimant does not provide contemporaneous billing records, specifically object that the lack thereof prevents adequate assessment of segregation of fees.

3. Other Issues

(a) Must Allocate Specific Time to Specific Tasks

In Long v. Griffin, the Texas Supreme Court evaluated an attorneys’ fees affidavit, which the court found used the lodestar method, that offered only generalities: indicating that one attorney spent 300 hours on the case, another expended 344.5 hours, and the attorneys’ respective hourly rates; positing that the case involved extensive discovery, several pretrial hearings, multiple summary
judgment motions, and a four and one-half day trial; and that litigating the matter required understanding a related suit that settled after ten years of litigation. But, no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks. 442 S.W.3d at 255. The Texas Supreme Court found this affidavit wholly insufficient, concluding “without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request.” Id.

Despite providing affidavit testimony that he had worked only 30 hours and generally describing the eight categories of work into which the 30 hours fell (which certainly seemed more than adequate for this simple case), the Fourteenth Court of Appeals found that the El Apple I requirements applied and that the claimant’s attorney did not “present proof as to how much attorney time was devoted to these eight categories” of tasks and, therefore, “failed to submit evidence providing sufficient details of the attorney work performed so that the trial court could make a meaningful review of his fee request.” Auz v. Cisneros, 477 S.W.3d 355, 361-62 (Tex. App.—Houston [14th Dist.] 2015) (citing Long v. Griffin, 442 S.W.3d at 255-56; City of Laredo v. Montano, 414 S.W.3d at 735-36; El Apple I, 370 S.W.3d at 760-64; Enzo Investments, LP, 468 S.W.3d at 652). In Auz, the Houston Court of Appeals majority noted the failure to present contemporaneous billing records at least twice in the opinion, once noting that he “did not submit time records or other documentary evidence that might show how much time was expended on the various categories of work.” See 477 S.W.3d at 361. The concurring opinion noted that, even in the simplest cases in which the claimant opts to use lodestar, Long, City of Laredo, and El Apple I require documentation allocating specific hours to specific tasks. See id. at 363. Attaching contemporaneous billing records would have likely solved this deficiency.40

In another case involving proof by presenting categories of time, Enzo Investments, LP v. White, the Fourteenth Court of Appeals found that one of White’s three attorneys failed to adequately segregate his fees. 468 S.W.3d 635, 650-55 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). That attorney’s affidavit lacked the specificity required to prove attorneys’ fees using the lodestar method, which requires that the party seeking recovery provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application. The attorney’s fee affidavit of White’s third attorney, however, merely listed general categories of work, without stating the amount of time spent on specific tasks. As a result, the Fourteenth Court of Appeals recommended (and White accepted) a remittitur to the total fees of the other two attorneys.

Similarly, in Helms v. Swansen, the Tyler Court of Appeals concluded that Swansen’s attorney elected to use the lodestar method requiring that he introduce sufficient evidence for the court to apply lodestar. No. 12-14-00280-CV, 2016 Tex. App. LEXIS 4540 *19-22 (Tex. App.—Tyler 2016, pet. denied) (mem. op.). However, Swansen’s counsel only noted that this is a complex case, stated his hourly rate, and calculated a total, which he presumably arrived at by multiplying his hourly rate by the number of hours worked. See id. at *21. The Tyler Court of Appeals described this testimony as “generalized” and specifically criticized Swansen’s counsel for not providing evidence of the time expended on specific tasks. Id. at *21-22. The Tyler Court of Appeals noted that “although he kept a record of the time spent on the case, he presented no documentation in

40 Based on the concurring opinion, if you are seeking attorneys’ fees by affidavit, read and follow these three Texas Supreme Court cases: Long v. Griffin, 442 S.W.3d 253 (Tex. 2014) (per curiam); City of Laredo v. Montano, 414 S.W.3d 731 (Tex. 2013) (per curiam); and El Apple I, Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012).
support of his request for fees. Without any evidence of time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request.” *Id.* at *22 (citing *Long v. Griffin*, 442 S.W.3d at 255). The Tyler Court of Appeals concluded that the trial court was not provided legally sufficient evidence to calculate a reasonable fee resulting in a remand to re-determine attorneys’ fees. *Id.* at *22-25.

Conversely, in *River Oaks L-M. Inc. v. Vinton-Duarte*, the claimant’s counsel, Pearson, attached an “attorney and paralegal time tracking chart” to his affidavit in which he covered the *Arthur Andersen* factors. See 469 S.W.3d 213, 233 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

On this chart, Pearson split his time and that of the paralegal who worked on the case into the following categories: EEOC; Interrogatories; Requests for Production; Document Review; Requests for Disclosures; Pleadings; Motions; Depositions; and Pre-trial, Trial, and Entry of Judgment. Under most of these categories, there is a fairly specific description of items, with a breakdown of the attorney and paralegal time spent on each item. Dates are also provided for most of the items.

The Fourteenth Court of Appeals found the tracking chart sufficient to adequately review the lodestar factors. *Id.*

**(b) Block Billing Not Prohibited**

In *Permian Power Tong, Inc. v. Diamondback E&P, LLC*, appellant objected to the claimant’s attorneys’ contemporaneous time records for containing block billing. See 550 S.W.3d 642, 664 (Tex. App.—Tyler 2017, pet. denied). The Tyler Court of Appeals found no issue under the circumstances, explaining:

> Block billing is not per se improper, so long as the entries provide meaningful review and are detailed enough to provide some indication of the time spent on various parts of the case. See *State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *John Moore Servs., Inc.* 2016 Tex. App. LEXIS 5814, 2016 WL 3162206, at *6-7). Diamondback submitted over 100 pages of detailed billing invoices, and Permian does not identify with specificity the billing entries of which it complains in this regard.41

*Id.* at 664. See also *Finserv Cas. Corp. v. Transamerica Life Ins. Co.*, 523 S.W.3d 129, 142 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (despite complaints that the contemporaneous billing records included block billing, heavy redaction, vague entries, clerical work, and duplicative tasks, the Fourteenth Court of Appeals found that the records contained the type of service provided, the name of the attorney providing the service, the date the service was performed, the hourly rate, and how much time the work required, which met Texas Supreme Court’s articulated bare minimum standard in *Long v. Griffin*).

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41 Permian originally objected at the trial court level to Diamond’s attorneys’ fees due to redactions, but Diamond filed a supplemental affidavit with the unredacted invoices.
Federal courts take a similar approach recognizing that the practice of block billing should be discouraged, but the court has discretion to determine if the practice impedes its ability to assess the reasonableness of the hours presented. See Cty. of Dimmit v. Helmerich & Payne Int'l Drilling Co., No. SA-16-CV-01049-RCL, 2018 U.S. Dist. LEXIS 32631, at *8-9 (W.D. Tex. 2018) (citing Fralick v. Plumbers & Pipefitters Nat'l Pension Fund, No. 3:09-CV-0752-D, 2011 U.S. Dist. LEXIS 13672, 2011 WL 487754, at *5 (N.D. Tex. Feb 11, 2011); distinguishing Leroy v. Houston, 906 F.2d 1068 (5th Cir. 1990) as the time entries therein were very simple and brief, utilized initials or abbreviations, and showed only one undivided amount for any one date; and ultimately finding that any issue with block billing had been accounted for as part of the court’s 15% reduction for failing to prove “billing judgment”). Finding “too many entries lump together tasks in such a way that it is impossible to tell whether, for any particular task, the number of hours spent and claimed were reasonable,” the trial court in reduced the requested fee by 6%. See Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *22-23 (E.D. Tex. 2017) (citing Fralick v. Plumbers & Pipefitters Nat'l Pension Fund, No. 3:09-CV-0752-D, 2011 U.S. Dist. LEXIS 13672, 2011 WL 487754, at *5 (N.D. Tex. Feb. 11, 2011)). The trial court acknowledged “the underlying concern with block billing is that the information provided will be so general that it will not be sufficient documentation to determine if the number of hours billed by counsel is reasonable.” Id. (citing Permian Power Tong, 550 S.W.3d 642, 653 (Tex. App.—Tyler 2017, pet. denied). Ultimately, although Tech Pharmacy’s counsel adequately described the tasks performed, counsel block billed the time making it impossible to tell whether, for any particular task, the number of hours spent and claimed were reasonable. See also Thomason v. Metro. Life Ins. Co., Civil Action No. 3:14-CV-86-K, 2018 U.S. Dist. LEXIS 35801, at *7-8 (N.D. Tex. 2018) (applying a 10% reduction because court cannot determine the reasonableness of the hours expended because too many tasks are lumped together.)

(c) Billing for Clerical Tasks Prohibited

Charges for clerical tasks are not recoverable, regardless whether billed by an attorney or paralegal. Cty. of Dimmit v. Helmerich & Payne Int'l Drilling Co., No. SA-16-CV-01049-RCL, 2018 U.S. Dist. LEXIS 32631, at *11 (W.D. Tex. 2018) (citing Missouri v. Jenkins by Agyei, 491 U.S. 274, 288 n. 10,109 S. Ct. 2463,2472, 105 L. Ed. 2d 229 (1989)). In order to be recoverable, the task must be similar to the work typically completed by attorneys; otherwise, it is an unrecoverable overhead cost. Id. (citing Allen v. U.S. Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982)). Examples of clerical tasks excluded by the court in COUTY of DIMIT included preparing and sending tasks such as “correspondence to clerk,” sending “inter-office email,” and “scanning and labeling affidavits”. Id. at *12.

(d) Redacting

At some point, heavily redacted records are of no value. See In the Interest of A.N.Z., No. 05-15-01443-CV, 2017 Tex. App. LEXIS 5211, at *6 (Tex. App.—Dallas June 7, 2017, no pet.) (mem. op.). Therein, the Dallas Court of Appeals noted that in a case where the billing statements were cryptic, heavily redacted, and showed fees for several matters, they were factually insufficient to sustain the attorneys’ fees award even though they were legally sufficient evidence. See id.
On the other hand, in a probate case analyzing a guardian’s fee application under the Probate Code (with no mention of lodestar or Arthur Andersen factors), the San Antonio Court of Appeals upheld an attorneys’ fees award over an optional completeness objection to redacted time entries, explaining:

The redacted fee statements contained significant information. For each billable time segment, the redacted statements clearly show the date, billing person, hours billed, amount billed, and a description of the work performed. See Tex. Prob. Code Ann. § 667; Woollett, 23 S.W.3d at 52. The redactions omit some of the information from a line item’s description of the work performed, but the redacted information is not necessary to determine the activity conducted by Bayern’s attorneys. Every redacted entry contained at least some information regarding the activities involved—"extended telephone conference," "legal analysis and research," "review the Bexar County Probate estate file to determine the scope of Carol Walker’s appointing order," etc. Further, the attorney primarily responsible for preparing the billing statements and redacting them testified that the fees were all reasonable and necessary, and the redactions were required to protect the attorney-client and work product privileges.

In the Estate of Johnston, No. 04-11-00467-CV, 2012 Tex. App. LEXIS 4255, at *5 (Tex. App.—San Antonio May 30, 2012, no pet.) (mem. op.). Many parties have raised the issue of heavily redacted contemporaneous billing records, but none has gotten the issue squarely addressed; either (1) as it was not properly before the court of appeals or (2) the court went in a different direction.

Similarly, federal court have found that redaction is acceptable as long as the Court can meaningfully review the fee request. Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *15-16 (E.D. Tex. 2017) A bill is adequate if it provides proof of the nature of the work, who performed the services and his rate, approximately when the services were performed, and the number of hours worked; however, bills should be excluded as evidence if the redacted entry does not provide sufficient information to classify and evaluate the activities and hours expended. Id. at *16. In Tech Pharmacy, the trial court found that the redacted bills were generally adequate, but the entries did not necessarily prove whether each was for a recoverable claim (breach of contract) or the unrecoverable claim (patent). The trial court accepted the applicant’s attorney’s affidavit splitting the fees fifty-fifty between recoverable and unrecoverable claims, thus overcoming the deficiency in the redacted time entries. Id. at *19.

42 See, e.g., Finserv Cas. Corp, 523 S.W.3d 129, 142 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (refusing to consider the complaint as the “FinServ Parties do not discuss any specific billing entries that they contend are overly redacted, vague, duplicative, or clerical.”); Jarvis v. Rocanville Corp., 298 S.W.3d 305, 320 (Tex. App.—Dallas 2009, pet. denied) (plaintiff’s argument that fee statements were so redacted that they prevented effective cross-examination about segregation of fees was not preserved for appeal and, therefore, waived); and Bosch v. Frost Nat’l Bank, No. 01-14-00191-CV, 2015 Tex. App. LEXIS 7481, at *18 (Tex. App.—Houston [1st Dist.] July 21, 2015, no pet.) (mem. op.).

43 See, e.g., Kartsotis v. Bloch, 503 S.W. 3d 506, 520 (Tex. App.—Dallas 2016, pet. denied) (wherein Kartsotis complained that “the fee statements were too heavily redacted and the attorney expert’s testimony was conclusory” and the court agreed that Bloch was not entitled to attorneys’ fees, but for a different reason).
We recommend that the fee applicant minimize redaction unless your time entries could be used as evidence against your client in other litigation (consider subjecting to non-disclosure agreement), in discovery battles (like a motion to compel), or in sanctions motions. Often the contemporaneous billing records are produced long after the work has been done and much of the tactical decisions or strategy have already been disclosed through discovery, deposition questioning, and motions. Even if it is arguably privileged, if it has been effectively disclosed, why redact it? However, before employing this tactic, you may wish to get a Rule 11 agreement from the opposing counsel that nothing in your attorneys’ fees billing records, affidavit, or application will not result in a subject matter waiver of the attorney-client privilege prior to providing unredacted billing records, affidavit, or application. If opposing counsel refuses this offer for more complete information, you can use this against them in any argument they make about redactions, although you still have the burden to present adequate information to support your award. The courts have been relatively reasonable about redacted bills. However, at some point, an objection can be made that the redactions do not allow the court to assess whether the work is duplicative, excessive, inadequately documented, or improperly segregated. Objecting to the mere fact of redacting is likely insufficient, but tying redaction to a more substantive point may be fruitful.

(e) Billing Judgment: Proving Work Not Duplicative, Excessive, or Inadequately Documented

In *Auz v. Cisneros*, the Fourteenth Court of Appeals noted that a trial court should obtain sufficient information to make a meaningful evaluation of the application for attorneys’ fees, which should adequately describe the work in order to exclude charges for duplicative, excessive, or inadequately documented. 477 S.W.3d 355, 361 (citing *El Apple I*, 370 S.W.3d at 762).

In *Great Northern Energy, Inc. v. Circle Ridge Production, Inc.*, one of the appellants many complaints about the claimant’s attorneys’ fees application was that the bills submitted by two law firms were “so insufficient that it [was] impossible to determine what duplication occurred.” No. 06-16-00015-CV, 2017 Tex. App. LEXIS 2415, at *62 (Tex. App.—Texarkana Mar. 22, 2017, pet. denied). While the Texarkana Court of Appeals ultimately remanded the attorneys’ fees issue based on a failure to segregate, it noted in a footnote that “the billing records contained notations such as ‘[f]act [r]esearch,’ ‘telephone conference,’ ‘[l]egal [r]esearch regarding potential suit,’ ‘editing,’ ‘[i]nteroffice conference,’ and other general references.” *Id.* at *63 & n.36. If these were the entire entries, it would seem impossible to evaluate whether the tasks described included charges for duplicative or excessive work and certainly seem to be inadequately documented.

Federal courts refer to this as “billing judgment” and require that the party seeking attorneys’ fees must prove that it exercised “billing judgment”, which means that it must present evidence of writing off unproductive, excessive, or redundant hours. *See Cty. of Dimmit v. Helmerich & Payne Intl Drilling Co.*, No. SA-16-CV-01049-RCL, 2018 U.S. Dist. LEXIS 32631*, at *7-8 (W.D. Tex. 2018) (citing *Walker v. United States HUD*, 99 F.3D 761, 769 (5th Cir. 1996) and acknowledging that the Fifth Circuit has previously determined that a 15% may be an appropriate reduction where billing judgment is not otherwise proven). *See also Tech Pharmacy Servs., LLC v. Alixa Rx LLC*, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *23-25 (E.D. Tex. 2017) (reducing the
attorneys’ fees sought by 6% for Tech Pharmacy’s lead counsel’s affidavit failing to refer to “a single minute that was written off as unproductive, excessive, or redundant.”) In Tech Pharmacy, the trial court acknowledged that the lead counsel assigned work to the lowest paying individual who could handle the assignment in the most efficient manner, but determined that this failed to account for writing off any time that was unproductive, excessive, or redundant. Id. at *24. The trial court further noted that Tech Pharmacy’s lead counsel’s bills did not show that any reduction was made. Id. The trial court acknowledged that Tech Pharmacy’s local counsel’s bills indicated reductions made to each bill for “payments/adjustments;” however, the trial court pointed out that Tech Pharmacy did not produce any evidence to suggest that these were adjustments made based on work that was unproductive, excessive, or redundant. Id. As such, the trial court found that the adjustments, on their own, did not show that the local counsel exercised billing judgment. Id.

(i.) PRACTICE POINTER: Keep Track of Written Off and Written Down Time

Given both state and federal courts’ requirement that the requesting party must prove good billing judgment, you should keep track of the time that has been written down or written off and, if possible, document the amounts in your application or affidavit. Additionally, you must tie the adjustments, write downs, or write offs to a vetting of the bills for unproductive, excessive, duplicative, inefficient, or inadequately documented work.

(ii.) PRACTICE POINTER: Tying Client Discounts to Billing Judgment

If you give the client a discount, consider arguing that your discount should be considered in assessing the written down or written off time for good billing judgment. If you give a 20% discount and the standard Fifth Circuit figure is 15%, you can argue that you have fully complied with the good billing judgment requirement, assuming, of course, that your hourly rate is otherwise reasonable. However, you will have to articulate that part of the basis of the discount it to account for unproductive, excessive, duplicative, inefficient, or inadequately documented work. If you vet your bills and provide a discount, document both in your affidavit or application.44

This requires a strategy decision on which route to choose: (a) swinging for the fence to try to maximize recovery (seeking the full undiscounted rates) or (b) playing small ball (sacrificing the discount) to make your recovery more reasonable and improving your chances of getting what you asked for. Factors to consider in this decision include those in Section VIII “A Few Thoughts on Strategy.”

(iii.) PRACTICE POINTER: Aver Billing Judgment in Your Application or Affidavit

Your application or affidavit should include a paragraph detailing your efforts. For instance, you should establish your practice of reviewing or vetting each invoice prior to issuing for reasonableness, necessity, excessiveness, duplication, adequate documentation, and efficiency; that time deemed to be unreasonable or excessive was reduced (specifying the total number of

44 However, see our discussion of Van Dyke v. Builders W. Lane, in which the attorneys seeking and recovering the full undiscounted rate. See Section V. Proving Attorneys’ Fees, H. Fees Not Paid, in Whole or in Part, or Paid by Third Party Still Recoverable, supra at p. 52.
hours reduced); that time deemed to be unnecessary or duplicative was cut (specifying the total number of hours reduced); that the overall bill was evaluated for efficiency in providing a reasonable service for the nature and size of the claim; that inadequately documented time was corrected, reduced, or cut; that a reasonable effort was made to have the work performed by the person with the lowest hourly rate capable of competently performing the task; and that every effort was made to use good “billing judgment” before issuing an invoice to the client. *Black v. SettlePou, P.C.,* 732 F.3d 492, 502 (5th Cir. 2013) (*citing Saizan v. Delta Concrete Prods. Co., Inc.*, 448 F.3d 795, 799 (5th Cir. 2006)); see also *El Apple,* 370 S.W.3d at 762-63.

(f) Reconstruction

In *Kinsel v. Lindsey*, the Texas Supreme Court recognized that, “even if contemporaneous records are unavailable, we have allowed for reconstruction of an attorney’s work and consideration of any evidentiary support of the time spent and tasks performed.” *Kinsel v. Lindsey,* 526 S.W.3d 411, 428 (Tex. 2017). In *El Apple I*, the Texas Supreme Court found that affidavits and other evidence in that case did not provide sufficient information for a lodestar calculation, requiring a remand to develop the record. The Court instructed counsel that if they did not have contemporaneous billing records that documents their time under the lodestar method, then they should reconstruct their work in the case to provide the minimum information the trial court requires to perform a meaningful review of their fee application. *El Apple I,* 370 S.W.3d at 764. See also *Long v. Griffin,* 442 S.W.3d at 255; and see also *Anani v. Abuzaid,* No. 05-16-01364-CV, 2018 Tex. App. LEXIS 4141, at *26-29 (Tex. App.—Dallas June 7, 2018, no pet. h.) (mem. op.) (citing *El Apple’s* approval of reconstructing time and allowing counsel to generally reconstruct in broad strokes his time spent in the file by describing the full day and half day tasks he spent working on the case, like all day deposition preparation, depositions, and travel and half day meetings, to prove up $100,000 in fees).

(i.) PRACTICE POINTER: You Can Edit Your Contemporaneous Billing Record

If you can reconstruct (*Kinsel v. Lindsey*), redact (*Finserv Cas. Corp*), and utilize charts or spreadsheets (*Total E&P USA*), you certainly ought to be able to edit to avoid disclosing sensitive or privileged matters. If you do not like the way redacted bills look, edit them. Instead of specific names, replace them with client, witness, opposing counsel, or some other designation. Instead of divulging strategy, edit the entries to generally describe what you have done. Of course, you must always provide enough detail to prove that the work is not duplicative, excessive, or inadequately documented.

(g) Objections to Attorneys’ Fees Must Be Specific, Documented, and Proven By Example

If you are going to object to the opponent’s fees based on one of the aforementioned bases, you must do so at the time of introduction, make the objections specific, and give specific examples of those failings in your objection. You cannot rely on sweeping, global, bald assertions. You have
to get into the weeds and cite examples in the record. Do your own audit in your opponent’s bills. Try making an enumerated list of failings and then denoting those numbers on a set of the offending bills in an appendix. This works not only for error preservation, but also for persuasion of the fact finder. Do not rely on the bills merely being in the record for the court to review and assess on their own. Several recent cases have found the debtor/defendant waived an appellant point due to a failure to object at trial or a failure to adequately brief the point. See Helms, 2016 Tex. App. LEXIS 4540 at *23 (finding that the appellant waived her appellate point on the claimant’s failure to segregate recoverable fees from those incurred on claims for which fees are not recoverable as she did not lodge a trial court objection on this ground); and Finserv Cas. Corp. v. Transamerica Life Ins. Co., 523 S.W.3d 129, 142 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (in which the appellants asserted that the billing records are inadequate because they include block billing, heavy redaction, vague entries, clerical work, and duplicative tasks; however, its appellate issues were waived as they made this general allegation without citing specific parts of the trial court record and did not discuss any specific billing entries that they contend were overly redacted, vague, duplicative, or clerical).

(i.) PRACTICE POINTER: Objections to Vagueness, Redaction, Block Billing, Should Be Tied To Precluding Cross-Examination on A Substantive Ground, Like Segregation

Given the minimum requirements for time entries, if you are going to object to the form of the bill, that objection needs to be tied to precluding a fair opportunity to evaluate a more substantive aspect like segregation, excessiveness, or, at least, duplication. Specific examples should be documented.

(ii.) PRACTICE POINTER: Applicants Should Consider Satisfying Defendant’s Arguably Valid Objections

If you have contemporaneous billing records and a strong claim for attorneys’ fees, why risk an appeal, much less a remand, on a technical point. Follow the example in Permian Power Tong and simply file an amended or supplemental affidavit or discovery response with proof meeting the objection. This is particularly true if you have agreed to submit the attorneys’ fees issue to the court. While segregating fees is covered more thoroughly in the following section, Jones v. Dyna Drill Techs., LLC, is an example of a case in which the plaintiff submitted an attorneys’ fees affidavit, summary of fees charged, and its redacted contemporaneous billing records and, at the hearing on attorneys’ fees, agreed to waive the fees to which the defendant objected as being related solely to an unrecoverable cause of action, all of which made the defendant’s appeal virtually impossible. No. 01-16-01008-CV, 2018 Tex. App. LEXIS 6689, at *31-36 (Tex. App.—Houston [1st Dist.] Aug. 23, 2018, no pet.) (mem. op.). The particularly damning questions was the trial court asking if the defendant had any other complaints about the amount of the fee and, on the record, its counsel replied “‘No, Your Honor, other than, of course, the availability. But in terms of the amount, no.’” Id. at *34. If you are willing to take this tactic and the trial court does not ask the opposing party, then you should attempt to do so and get the response in the record.

45 A good example of the specifics necessary can be found in Appendix D. See also Permian Power Tong, Inc. v. Diamondback E&P, LLC, 550 S.W.3d 642 (Tex. App.—Tyler 2017, pet. denied).
(h) Utilizing § 18.001 Cost and Necessity Affidavit to Submit Fees and Billing Records

In *Lion Co-Polymers Holdings, LLC v. Lion Polymers, LLC*, the prevailing party filed what the court determined constituted a Chapter 18 cost and necessity affidavit along with its contemporaneous billing records. No. 01-16-00848-CV, 2018 Tex. App. LEXIS 4835, at *39-43 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. filed) (mem. op.). This triggered the requirement for the non-movant to file a controverting affidavit pursuant to section 18.001(b), which it did not do, allowing the court to enter summary judgment on the requested fees. *Id.* at 42. The court noted that (1) “clear, direct, and uncontroverted evidence of fees taken as true as matter of law where such evidence not rebutted” and (2) where there is no controverting affidavit, “mere criticism of the amount of attorney’s fees sought does not create a fact issue ….” *Id.*

J. Segregating Fees

A claimant who pursues multiple causes of action or multiple defendants can only recover those attorneys’ fees attributable to those causes of action from those defendants for which a contract or statute provide recovery of attorneys’ fees. By way of concrete example, many plaintiffs pursue a breach of contract and common law fraud claim in the same suit. Chapter 38 permits recovery of attorneys’ fees on the breach of contract, but, as a tort, common law fraud does not allow for recovery of attorneys’ fees. Fees attributable to the unrecoverable common law fraud cause of action must be segregated. Likewise, if a plaintiff sues two defendants and settles with one prior to trial, the attorneys’ fees attributable to developing a case against the settling defendant need to be segregated. Unfortunately, cases and legal work do not cleanly divide into work done solely on the contract case as opposed to work done on the common law fraud case. The same is true for prosecuting the claims against defendants. The facts and work are often intermingled. The fight is often about precisely which fees can be attributed to recoverable causes of action and defendants and which must be segregated. Once the theoretical divide is determined, the next issue is, as a practical matter, how to go about segregating the fees and proving up the recoverable fees.

1. Segregate by Discrete Legal Task (Sterling Is Dead; Long Live Chapa)

(a) Historical *Sterling* Exception for Intertwined Facts

Segregation of fees has become an overly confused area. Historically, the Texas Supreme Court addressed the issue of segregating attorneys’ fees in *Stewart Title Guaranty Co. v. Sterling*. See 822 S.W.2d 1, 10 (Tex. 1991). In that case, Stewart Title objected to the plaintiff’s failure to

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46 This statute is under consideration in the 2019 legislature; however, this aspect does not appear to be part of the proposed changes.

47 Arguably, a contractual provision could be broad enough to permit recovery for the entire litigation making segregation unnecessary. On the other hand, courts have recognized that the limitations of awarding only equitable and just fees that are reasonable and necessary as authorized under the Texas Uniform Declaratory Judgment Act, “are complimented by other limiting principles, such as segregation of fees.” See *Lederer v. Lederer*, 561 S.W.3d 683, *699 (Tex. App.—Houston [14th Dist.] Aug. 30, 2018, no pet.).

48 *Sterling* pre-dated *Arthur Andersen* and the adoption of its factors and *El Apple I* and its recommendation of lodestar. Thus, the standard for recovery of attorneys’ fees was simply “reasonable and necessary” fees “in relation to the work
segregate fees in prosecuting the case against each defendant. In addressing Stewart Title’s objection, the Texas Supreme Court began by recognizing that Texas law required segregation of fees by (1) causes of action and (2) defendants, particularly where one had settled prior to trial. *Id.* at 10-11. However, the Texas Supreme Court recognized that an:

exception to this duty to segregate arises when the attorney’s fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their “prosecution or defense entails proof or denial of essentially the same facts.” *Flint & Assoc. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624-25 (Tex. App.—Dallas 1987, writ denied). Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are “intertwined to the point of being inseparable,” the party suing for attorney’s fees may recover the entire amount covering all claims. *Gill Sav. Ass’n v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex. App.—Houston [14th Dist.] 1989), modified, 797 S.W.2d 31 (Tex. 1990) (remanded to the trial court for reexamination of attorney’s fee award).

*Id.* at 11-12. Notably, this recognized exception is arguably *dicta*, as in the very next sentence the Texas Supreme Court seemingly disregarded the exception and ruled that “following a review of the record, we conclude that the attorney’s fees are capable of segregation.” *Id.* at 12. However, the damage had been done. The exception was recognized and firmly embedded in the jurisprudence, so much so that virtually every claimant asserts that (1) their claims arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts and (2) their causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable.

**(b) Chapa Modifies Sterling, Mandating Task By Task Segregation**

Fifteen years later, in *Tony Gullo Motors I, L.P. v. Chapa*, the Texas Supreme Court revisited segregation of attorneys’ fees; specifically, the exception recognized by *Sterling*. See 212 S.W.3d 299 (Tex. 2006). In that case, Chapa received favorable jury verdict findings on her breach of contract, DTPA, and fraud claims. Gullo Motors objected that fees were not recoverable for Chapa’s fraud claim, and thus had to be excluded. See id. at 310. The Texas Supreme Court began by noting “the American Rule,” which, in this case required Chapa “to segregate fees between claims for which they are recoverable and claims for which they are not.” *Id.* at 310-11. The Texas Supreme Court then turned its attention to the above-quoted exception invoked by *Sterling*. *Id.* at 311. It noted that the *Sterling* exception “threatened to swallow” the rule; had not previously been recognized by the court, but had been developed by a few courts of appeals about 10 years earlier; and was not even applied in the *Sterling* case itself by the Court. See id. However, the result of the *Sterling* exception was a flood of cases (over 100) claiming recoverable and unrecoverable fees are inextricably intertwined, with the courts of appeals having difficulty consistently applying the exception and disagreeing about what makes two claims inextricably intertwined. See id. at 312 & n.72. After further analysis, the Texas Supreme Court declared a new standard:

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expended.” Additionally, the attorneys’ fees claim in *Sterling* was predicated on Article 21.21 § 16 of the Texas Insurance Code, not contract or Chapter 38.
It is certainly true that Chapa’s fraud, contract, and DTPA claims were all “dependent upon the same set of facts or circumstances,” but that does not mean they all required the same research, discovery, proof, or legal expertise. Nor are unrecoverable fees rendered recoverable merely because they are nominal; there is no such exception in any contract, statute, or “the American Rule.” To the extent Sterling suggested that a common set of underlying facts necessarily made all claims arising therefrom “inseparable” and all legal fees recoverable, it went too far.

Accordingly, we reaffirm the rule that if any attorney’s fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify Sterling to that extent.

Id. at 313-14 (emphasis added). The Texas Supreme Court noted that many tasks “involved in preparing a [recoverable] claim for trial must still be incurred if [unrecoverable] claims are appended to it; adding the latter claims does not render the former services unrecoverable. . . . To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.” Id. at 313.

So, after Chapa, the rule is that you have to (1) identify recoverable and unrecoverable claims, (2) designate which discrete tasks solely advance the unrecoverable claims, (3) segregate those charges from the rest, and (4) refrain from submitting those segregated fees. Even nominal fees have to be segregated as the Texas Supreme Court noted no exception to the rule for such fees. See id. You should not argue that the causes of action or underlying facts and circumstances are so inextricably intertwined that you need not or cannot segregate fees.

We would note that Kinsel v. Lindsey contains some loose analysis that arguably could suggest that Sterling has a glimmer of life. 526 S.W.3d 411, 428 (Tex. 2017). That case begins its segregation analysis by citing Chapa and recognizing that:

Accordingly, to recover attorneys fees, the Kinsels were required to segregate work relating to recoverable and non-recoverable claims. An exception exists only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible. Id. at 313-14. But “it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.” Id.

Id. at 428. Thus, the focus should be specifically on discrete legal services, not globally on the underlying facts and causes of action. However, when evaluating attorneys’ fees, the Texas

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49 Since the Chapa opinion’s release in December of 2006, the headnote containing the court’s rejection of intertwined facts as a basis for avoiding segregation and adopting discrete legal services analysis has been cited 340 times (per Lexis) in a little over a decade.

50 Including that 0.2 telephone call if it does not further a recoverable claim.
Supreme Court appears to slip into the *Sterling* mindset of looking at the underlying facts and causes of action by saying:

Counsel for the Kinsels testified the claims were “inextricably intertwined,” such that “whatever cause of action the plaintiffs have in this case, the facts basically relate to each of the causes of action.” But the court of appeals observed that some of the Kinsels’ claims addressed the “status of [Lesey’s] mental abilities” while others depended on a showing that Jane, Bob, and Keith “uttered false statements” and that the Kinsels relied on those statements. As such, “the causes of action were distinct, and facts necessary to prove each did not overlap.” We agree.

*Id.* at 427-428 (citations omitted). Perhaps, as it was only agreeing with and affirming the court of appeals, the Texas Supreme Court did not feel the need to elucidate. However, Kinsel’s counsel clearly used a *Sterling* based analysis and the court of appeals and the Texas Supreme Court seem to have followed suit.

**(c) Appellate Courts Strictly Following Chapa**

Some appellate courts have taken *Chapa* to heart. One such case is *Westergren v. National Property Holdings, L.P.* At the court of appeals, the defendant complained that Westergren failed to segregate his fees between his recoverable and unrecoverable causes of action, and, predictably, Westergren responded by arguing that segregation is not required where services are rendered in connection with claims arising out of the same transaction and are so interrelated that prosecuting the claims and defending the counterclaims entail the same facts. See 409 S.W.3d 110, 137 (Tex. App.—Houston [14 Dist.], 2013) *aff’d in part, rev’d in part*, 453 S.W.3d 419 (Tex. 2015). The Fourteenth Court of Appeal rejected Westergren’s argument and found that he failed to show that segregation of attorney fees attributable to tort and contract claims was not required. In doing so, the court explained:

Generally, a party seeking attorney’s fees must segregate fees incurred in connection with a claim that allows their recovery from fees incurred in connection with claims for which no such recovery is allowed. Texas courts recognize an exception to this general rule. *When discrete legal services advance both recoverable and unrecoverable claims, attorneys are not required to segregate fees to recover the total amount covering all claims.* In this situation, the claims are said to be “intertwined,” and the mere fact that attorney’s fees are incurred in advancing both recoverable and unrecoverable claims does not render those fees unrecoverable. But if any attorney’s fees relate solely to a claim for which fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. . . .

. . . [T]he Texas Supreme Court expressly has held “[i]ntertwined facts do not make tort fees recoverable.” Instead, the focus is whether the legal work performed pertains solely to claims for which attorney’s fees are unrecoverable. *This does not mean examining the work product as a whole, but rather parsing it into component tasks.*

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51 The Texas Supreme Court opinion did not deal with the attorneys’ fees issue.
Id. at 137-38 (emphasis added) (citations omitted). In addition to Chapa, the Fourteenth Court of Appeals relied on a number of other cases in coming to its conclusion. See id. (citing CA Partners v. Spears, 274 S.W.3d 51, 81 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); 7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc., 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (a case in which the court held the fees for writing a single paragraph for an unrecoverable claim in plaintiff’s petition had to be segregated, saying: “The attorneys’ fees relating solely to the prosecution of those claims and hence, to drafting this language, are not recoverable”)).

Lindemann Properties, Ltd. v. Campbell is another case strictly following Chapa. See 524 S.W.3d 873 (Tex. App.—Forth Worth 2017, pet. denied). Therein, Lindemann complained that Campbell had failed to segregate his attorneys’ fees for work done to defend against the trespass claim for which fees were not available. For instance, Lindemann claimed that extensive portions of Campbell’s deposition cross-examination focused solely on potential monetary damages, which related only to the trespass claim. Despite this, the trial court’s conclusion of law ruled the fees incurred in defending Lindemann’s trespass claim were intertwined with the fees incurred in defending against Lindemann’s declaratory-judgment claim. Recognizing that the Texas Supreme Court decision in Chapa supersedes its decision in Sterling, the Fort Worth Court of Appeals quoted the salient portion of the former decision:

Accordingly, we reaffirm the rule that if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify Sterling to that extent.

Id. at 889. In its conclusions of law, the trial court said: “Necessary legal services performed for Defendant on Lindemann’s trespass claim are indistinguishable from necessary legal services performed for Defendant to create and sustain its arguments regarding the surface burden of the Original and New Towers.” However, as the Texas Supreme Court has recognized that the threshold inquiry in construing an easement is not whether the proposed use results in a material burden, but whether the grant’s terms authorize the proposed use, the Fort Worth Court of Appeals held that the fees that Campbell incurred defending against Lindemann’s trespass claim did not also advance Campbell’s defense to Lindemann’s declaratory-judgment claim regarding the easement’s construction. Id. at 889. Therefore, the trial court abused its discretion by awarding Campbell unsegregated attorney’s fees and remanded the case for a new trial on only the attorneys’ fees issue. Id. at 889.52

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52 This case supports the proposition that analysis of the legal issues drives the segregation argument. However, if we are looking discrete task by discrete task, is a deposition not a discrete task? Surely, individual questions are not discrete tasks. If the deposition addressed both recoverable and unrecoverable issues, would it not be covered under Chapa? If so, why does the Fort Worth Court of Appeals confuse the issue by discussing Lindemann’s complaint about the deposition? However, Lindemann’s complaint (pointing to a specific task) did not suffer from the same generality that sunk FinServ’s complaints. See FinServ Cas. Corp. v. Transamerica Life Ins. Co., 523 S.W.3d 129, 142 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
Likewise, in Khoury v. Tomlinson, the First Court of Appeals recognized that Chapa displaced Sterling. See 518 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Khoury sued Tomlinson and others alleging securities violations under the Texas Securities Act, common-law fraud, and breach of contract. The jury found in favor of Khoury against Tomlinson on all three claims awarding Khoury $400,000 plus attorneys’ fees. The First Court of Appeals acknowledged that attorneys’ fees must be segregated between claims for which they are recoverable and claims for which they are not as well as between defendants, except where discrete legal services advance both recoverable and unrecoverable claims. Id. at 580. Unfortunately, Khoury’s counsel testified that he did not segregate, relying on Stewart Title. In fact, his exact words were: “‘there’s . . . a rule that says if the facts of the case are so inextricably intertwined that it’s the same set of facts, the same nucleus of operative facts that gives rise to these claims,’ segregation is not necessary.” He testified that all of Khoury’s attorneys’ fees fell under this category. ”Id. The First Court of Appeals noted simply: “This is not the law, however.” Id. Rather, the discrete legal services must be intertwined. Id. at 581. As some of the attorneys’ fees were for unrecoverable claims and against parties against whom he did not recover, he did not present sufficient information to support his claim that none of the attorneys’ fees needed to be segregated. The case was remanded for a new trial on attorneys’ fees, which is the proper remedy when a party fails to segregate fees.

In Great Northern. Energy, Inc. v. Circle Ridge Production, Inc., Circle Ridge brought, among others, a breach of contract claim and several tort claims. See No. 06-16-00015-CV, 2017 Tex. App. LEXIS 2415, at *62 (Tex. App.—Texarkana Mar. 22, 2017, pet. filed). Circle Ridge prevailed on its breach of contract claim and the trial court awarded it over $150,000. Circle Ridge’s motion for attorneys’ fees and supporting affidavits generally identified the attorneys involved, the general scope of their work, the total hours billed, and the hourly rates. Id. at 62-63. Additionally, the motion attached billing records that contained general descriptions of the work performed, but did not segregate work performed for causes of action under which attorneys’ fees would not be recoverable. Id. at 63. Citing Chapa, the Texarkana Court of Appeals recited the requirements that (1) if any attorneys’ fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees and (2) intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. Id. at 63-64. The court then noted that: “Legal research and other work completed with respect to these tort claims would not advance Circle Ridge’s breach of contract or trespass to try title claims.” Id. at 64. Because the Texarkana Court of Appeals found that the fees were not properly segregated, it remanded the case for factual determination of which fees were recoverable. Id. at 63-64.

In Permian Power Tong, Inc. v. Diamondback E&P, LLC, Diamondback submitted an attorneys’ fees application complete with affidavit and supporting contemporaneous billing records. See 550 S.W.3d 642, 663 (Tex. App.—Tyler 2017, pet. denied)). In the affidavit, Diamondback’s attorney averred that he was aware of the requirement to segregate unrecoverable fees, but that none of the submitted fees were solely related to an unrecoverable claim. Permian reviewed the contemporaneous records and found $20,000 in fees it believed were unrecoverable. The trial court awarded Diamondback all of its fees. The Tyler Court of Appeals reversed and remanded that decision saying:
Our review of Permian’s Exhibit A shows that at least some of the billing entries do not relate solely to the breach of contract claim. Therefore, the law required Diamondback to segregate its unrecoverable fees unless those discrete legal services also advanced its breach of contract claim. See Chapa, 212 S.W.3d at 313-14. Diamondback failed in this regard. For example, one of the billing entries describes the work as, “[r]esearch ability to tender money into court in order to void mineral liens or potential mineral liens.” Another entry described the work as, “[r]eview and revise open records letter to Department of Public Safety.” Many of the other billing entries relate to insurance coverage. Some of those services may be recoverable, but after challenged by Permian, Diamondback made no effort to show that the services relate solely to a recoverable claim or otherwise advanced a recoverable claim. Diamondback had the burden to show that segregation was not required, and we are unable to discern how the entries in Exhibit A relate to or advance a recoverable claim. See CA Partners v. Spears, 274 S.W.3d 51, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (reversing award of attorney’s fees even though attorney testified that no segregation was required, but attorney “failed to articulate how the legal services that she performed advanced both recoverable and unrecoverable claims”).

No matter how nominal, an unrecoverable fee that does not advance a recoverable claim must be segregated from the request for attorneys' fees. See Chapa, 212 S.W.3d at 313.

Id. at 665-66 (emphasis added). Clearly, Permian did its homework and cited specific examples and the Tyler Court of Appeals correctly applied Chapa. See also Anderton v. Green, 555 S.W.3d 361, 374-375 (Tex. App.—Dallas 2018, no pet.) (holding that “Jennifer’s attorney’s argument that her fees were “intertwined” was an insufficient basis for the trial court’s award” and remanding the attorneys’ fees issue); Corey v. Rankin, No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224, at *26-27 (Tex. App.—Houston [14th Dist.] Nov. 13, 2018, no pet.) (mem. op.) (rejecting appellees’ argument that they need not segregate as “their fees ‘cannot reasonably be segregated as the claims brought by [the Rankin Appellees] are inexplicably intertwined’” and requiring assessment by discrete legal tasks and proof that “every legal service that advanced unrecoverable claims also advanced recoverable claims”). Corey articulates a very high standard for segregation, although it does cite cases that offering a percentage will suffice. Id. at *25.

In Lederer v. Lederer, the Houston Fourteenth Court of Appeals remanded the attorneys’ fees portion of the case when the plaintiffs’ attorneys’ expert admitted that he had made no effort to segregate his fees as “the work” was “inextricably intertwined”; however, the court found this factually incorrect where the only grounds for recovering attorneys’ fees was the defense of a declaratory judgment counterclaim, the plaintiffs had multiple unrelated (or arguably unrelated) affirmative claims that were abandoned, the plaintiffs’ expert “did not offer any testimony that all the legal services that advanced the unrecoverable claims also advanced the recoverable defense of the declaratory judgment action, and plaintiffs’ expert did not opine as to a percentage of fees

53 For a federal court case applying Chapa, see Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *19-21 (E.D. Tex. 2017), which reduced the attorneys’ fees by 7% for time expended exclusively on non-recoverable claims based on Tech Pharmacy’s allocation in its task estimate; otherwise, the trial court noted that the remaining hours were inextricably intertwined apparently accepting Tech Pharmacy’s representation that “‘[m]ost of the discovery on the state law claims would have been necessary even if this had been exclusively a breach of contract action.’” Id. at *21.
related solely to the unrecoverable action. 561 S.W.3d 683, *701-03 (Tex. App.—Houston [14th Dist.] Aug. 30, 2018, no pet.).

In *Yamin v. Carroll Wayne Conn, L.P.*, the Houston Fourteenth Court of Appeals (1) rejected Conn’s claims that all of its attorneys’ fees were recoverable because the facts supporting avoidance of both contracts were identical and, by definition, intertwined with, among other things, this veil piercing claim for which fees were not recoverable and, (2) instead insisted that “‘only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.’” *Yamin v. Carroll Wayne Conn, L.P.*, No. 14-16-00715-CV, 2018 Tex. App. LEXIS 10713, at *39-40 (Tex. App.—Houston [14th Dist.] Dec. 21, 2018, no pet.) (quoting *Chapa*, 212 S.W.3d at 313-14.) Before analyzing various discrete legal tasks, the court held “because fees for some discrete tasks were recoverable and fees for other discrete tasks were not, Conn was required to segregate its attorney's fees but failed to adequately do so.” *Id.* at *41. This is a strong case if you are trying to hold the applicant to the highest segregation standard.

(d) Appellate Courts Effectively Reverting To *Sterling*

In *Brinson Benefits, Inc. v. Hooper*, the Dallas Court of Appeals appeared headed in the right direction, but then swerved into oncoming traffic at the very end. 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.). In that case, the court evaluated Brinson’s contention that HMA and Sendelbach failed to properly segregate their fees by parsing the work into component tasks. Brinson sued HMA and Sendelbach for various common law torts in addition to a conspiracy claim based on theft under the Texas Theft Liability Act (“TTLA”), which awards the prevailing party attorneys’ fees. In turn, Sendelbach counterclaimed for breach of contract. HMA and Sendelbach prevailed in the TTLA claim and, as such, were entitled to attorneys’ fees as the prevailing party. Sendelbach had a counterclaim for breach of contract and he had multiple common law tort claims. Brinson argued that at least some of the attorneys’ fees could not have been directed at the TTLA claim on which HMA and Sendelbach prevailed. Conversely, HMA and Sendelbach contended that, at its core, Brinson’s lawsuit had a single premise: theft. As such, all of theories had a common set of facts and, therefore, none of the claims could have been segregated from one another, other than the breach-of-contract claim, which was excluded from the application for prevailing party fees. Citing *Chapa*, the Dallas Court of Appeals recognized that fees for services that are not recoverable must be segregated, unless the discrete legal services advanced both the recoverable claim and the unrecoverable claim. *Id.* at 645. The need to segregate fees is a question of law, while the extent to which certain claims can or cannot be segregated is a mixed question of law and fact. *Id.* At this point, the Dallas Court of Appeals veered off course and reverted to citing *Sterling*, despite its disapproval on this very point by *Chapa*, upon which the Dallas Court of Appeals was relying heavily. “When the causes of action involved in the suit are dependent upon

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54 In *Lederer*, (1) the plaintiffs introduced the contemporaneous billing records bills into evidence; (2) had $425,000 in fees and voluntarily discounted them to $300,000; and (3) court only awarded $107,000, without stating a reason for the further reduction. On appeal, the plaintiff could have argued that the appellate court had authority to review the record (particularly the bills for which plaintiffs should have prepared an appendix identifying the DJA related expense), assessed an amount for fees related to defense of declaratory judgment action, and found $107,000 was within that amount allowing affirmance based on was no harmful error. This argument may not have succeeded, but would have been worth a try to avoid incurring more fees on remand.
the same set of facts or circumstances and thus are ‘intertwined to the point of being inseparable,’
the party suing for attorney’s fees may recover the entire amount covering all claims.” Id. The
Dallas Court of Appeals concluded that all of Brinson’s claims against HMA and Sendelbach arose
from a common set of facts and were not segregable. Therefore, it affirmed the trial court’s award.

*Pike v. Tex. EMC Mgmt., LLC* involved a partnership break-up with breach of contract as well as
tort claims. See No. 10-14-00274-CV, 2017 Tex. App. LEXIS 5217, at *52-58 (Tex. App.—Waco
June 7, 2017, pet. reinstated) (mem.op.). The claim for attorneys’ fees appears to have been based
on Chapter 38 as at least the presentment issue references section 38.002 of the Texas Civil
Practice and Remedies Code. The appellants objected to the claimants’ failure to segregate their
attorneys’ fees. The Waco Court of Appeals acknowledged that “[o]rdinarily, fees claimants must
segregate fees between claims for which they are recoverable and claims for which they are not.”
Id. at 57 (citing *Chapa*, 212 S.W.3d at 311). Thereafter, the court reverted to *Sterling*.

However, a recognized exception to the duty to segregate arises when the attorney’s fees
rendered are in connection with claims arising out of the same transaction and are so
interrelated that their “prosecution or defense entails proof or denial of essentially the same
facts.” *Sterling*, 822 S.W.2d at 10; see *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121,
143 (Tex. App.—Waco 2005, pet. denied). “Therefore, when the causes of action involved
in the suit are dependent upon the same set of facts or circumstances and thus are
‘intertwined to the point of being inseparable,’ the party suing for attorney’s fees may
recover the entire amount covering all claims.” *McCalla*, 167 S.W.3d at 143 (quoting
*Sterling*, 822 S.W.2d at 11).

*Id.* at 57-58. The Waco Court of Appeals then noted that appellees’ testified that the contract claims
against appellants were too intertwined with the other claims in the case to segregate. *Id.* at 58.
The Waco Court of Appeals agreed that the record supported this contention. *Id.* “Accordingly, . . .
we cannot say that the trial court abused its discretion in accepting appellees’ testimony that the
claims were too intertwined to segregate and awarding appellees’ attorney’s-fees request.” *Id.*

*Reyelts v. Cross*, a federal district court decision, suffers the same malady. See 968 F. Supp. 2d
835, 850 (N.D. Tex. 2013). *Reyelts* involved DTPA and Texas Debt Collection Practices Act
claims. The court awarded approximately $125,000 in damages and $259,560 in attorneys’ fees.
The defendants objected to the claimant’s failure to segregate claims unrelated to the lawsuits and
the judgment. The court, found no segregation was required, noting the “common core of facts”
were “so ‘interrelated.’” In reaching this determination, the court cited a Fifth Circuit case from
2007 that, in turn, cited *Sterling*. See *id.*

Likewise, although citing *Chapa, Lowry v. Tarbox*, 537 S.W.3d 599, 618-620 (Tex. App.—San
Antonio 2017, pet. denied) effectively followed *Sterling* accepting Tarbox’s attorneys’ assertions
that: “the legal services related to all causes of action were intertwined and their fees could not be
segregated due to the interrelated nature of the causes of action and issues involved. Further, Kaiser
attested the legal services rendered would have been necessary even if Dr. Tarbox had not asserted
the causes of action for which attorney’s fees are unrecoverable.” This very global approach fails
to evaluate services on an entry by entry basis and smacks of the old *Sterling* standard.
In *Lopez v. Huron*, Huron sued both Lopez and A.J. Plastics for breach of implied warranty based in contract. See 490 S.W.3d 517 (Tex. App.—San Antonio 2016, no pet.). Lopez asserted counterclaims against Huron for breach of contract, quantum meruit, unjust enrichment, fraud, and violations of the Texas Theft Liability Act under which (the prevailing party being entitled to attorneys’ fees). Huron prevailed on his claim and defeated Lopez’s counterclaims. The jury also awarded Huron attorneys’ fees for prevailing on the warranty claim and for successfully defending against Lopez’s counterclaims. Lopez complained that Huron failed to segregate the recoverable fees from the unrecoverable fees and, of course, Huron responded that segregation was not required because the claim for which attorneys’ fees were recoverable and the claims for which attorneys’ fees were not recoverable were intertwined. *Id.* at 525. The San Antonio Court of Appeals cited *Chapa* for the proposition that “[a]lthough attorney’s fees generally must be segregated, segregation is not required when discrete legal services advance both a claim on which attorney’s fees are recoverable and a claim on which fees are not recoverable.” *Id.* The court then found that prosecution of Huron’s claim and defense of the counterclaims required proof of the same set of operative fact, as Huron’s attorney testified. *Id.* at 525-26. Therefore, without parsing individual tasks, the San Antonio Court of Appeals overruled Lopez’s point, saying “segregation is not required when discrete legal services advance both a claim on which attorney’s fees are recoverable and a claim on which fees are not recoverable . . . .” *Id.* at 526. The San Antonio Court of Appeals clearly paid only lip service to *Chapa*.55

### 2. Discrete Tasks Defined

In *Chapa*, the Texas Supreme Court did not define discrete legal services; however, in discussing the issue, it did give a number of examples: research, requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, and *voir dire* of the jury. *Chapa*, 212 S.W.3d at 313. It also recognized that, “to the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.” *Id.*

Likewise, in *Westergren*, the Fourteenth Court of Appeals rejected Westergren’s argument that he need not segregate as his claims had interwoven facts, reversed the award of attorneys’ fees for failing to segregate by discrete task, and gave the following example:

> While Westergren’s contract and tort claims may have involved developing some of the same facts and presenting some of the same evidence, Westergren has failed to present evidence that his partnership and fraud claims did not require any solely separate drafting, legal research, or discovery.

*Westergren*, 409 S.W.3d at 138. This seems consistent with *Chapa* and does not appear to require a breakdown into subsets of tasks.

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55 The San Antonio Court of Appeals decision may have been influenced by (a) its assumption for the purpose of the appeal that Lopez had not waived the segregation issue and (b) Huron’s attorney’s testimony that he stopped calculating his fees after they were in excess of $70,000 and only requested $50,000.
However, in *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, the same court of appeals took a slightly different tact, holding that the fees for writing a single paragraph for an unrecoverable claim in plaintiff’s petition had to be segregated and saying: “The attorneys’ fees relating solely to the prosecution of those claims and hence, to drafting this language, are not recoverable.” 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

(a) Segregating For Counterclaims, Cross-Claims, and Affirmative Defenses

In *Turner v. NJN Cotton Co.*, NJN Cotton brought a breach of contract and promissory estoppel claim against Turner, who responded with myriad affirmative defenses and a counterclaim. See 485 S.W.3d 513, 528 (Tex. App.—Eastland 2015, pet. denied). NJN Cotton recovered on its breach of contract claim and attorneys’ fees. On appeal, Turner argued that NJN Cotton had failed to segregate its fees. The Eastland Court of Appeals determined that Chapter 38 permits recovery of attorneys’ fees on promissory estoppel claims. *Id.* at 528. Thus, both of NJN Cotton’s claims were recoverable. Turning to the work done on the affirmative defenses and counterclaims, the Eastland Court of Appeals declared:

> Here, in order to recover on its breach of contract claim, NJN had to defend against the myriad affirmative defenses pleaded by Turner as well as the counterclaims that Turner pleaded for conversion and tortious interference. Attorney’s fees incurred in defense of those matters were necessary to a recovery by NJN on its contract claim and, thus, were recoverable. *See Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (attorney’s fees incurred in defending against defenses and counterclaim necessary to a recovery on contract are recoverable and need not be segregated).

*Id.*

Likewise, in *Anglo-Dutch Petroleum International, Inc. v. Case Funding Network, LP.*, Anglo-Dutch argued that the investors failed to segregate their attorneys’ fees between the contract claims and the fraudulent inducement tort claim. See 441 S.W.3d 612, 632-35 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). The Houston First Court of Appeals began by citing *Chapa’s* requirement that fees for discrete legal services solely directed at unrecoverable claims must be segregated despite intertwined fact. *Id.* at 634. Then, citing *Varner v. Cardenas*, the First Court of Appeals ruled that it was not necessary for the investors to segregate the claims, because to overcome Anglo-Dutch’s defense of release to the breach of contract claims, the investors had to pursue the fraudulent inducement claims to defeat Anglo-Dutch’s breach of contract defense of release. *Id.* at 634-35.

In *Lopez v. Huron*, Huron sued both Lopez and A.J. Plastics for breach of contract and had to defend against Lopez’s counterclaims for breach of contract, quantum meruit, unjust enrichment, fraud, and violations of the Texas Theft Liability Act (the prevailing party being entitled to attorneys’ fees). See 490 S.W.3d 517 (Tex. App.—San Antonio 2016, no pet.). Huron prevailed on his claim and defeated Lopez’s counterclaims. The jury awarded Huron attorneys’ fees for prevailing on the contract claim and for successfully defending against Lopez’s counterclaims. Lopez complained that Huron failed to segregate the recoverable fees from the unrecoverable fees: the defense of the counterclaims. Despite the San Antonio Court of Appeals citing *Chapa* for the
proposition that segregation is analyzed at the discrete legal services level, the court then found that prosecution of Huron’s claim and defense of the counterclaims required proof of the same set of operative facts, as Huron’s attorney testified. Id. at 525-526. Therefore, without parsing individual tasks, the San Antonio Court of Appeals overruled Lopez’s point. Id. at 526. While the San Antonio Court of Appeals analysis drifts awfully close to Sterling by relying not on a review of discrete legal task and instead looking at the common set of operative facts, it apparently got the right result.

In dicta, the Texas Supreme Court in Chapa recognized that a claimant need not segregate its attorneys’ fees for work performed to defeat affirmative defenses, saying: “There may, of course, be some disputes about fees that a trial or appellate court should decide as a matter of law. For example, to prevail on a contract claim a party must overcome any and all affirmative defenses (such as limitations, res judicata, or prior material breach), and the opposing party who raises them should not be allowed to suggest to the jury that overcoming those defenses was unnecessary.” Chapa, 212 S.W.3d at 314.

In 7979 Airport Garage, L.L.C. v. Dollar Rent A Car Systems, the Fourteenth Court of Appeals cited Chapa for the proposition that a claimant need not segregate fees for defeating the defenses to its claims and Varner v. Cardenas for the like proposition regarding defeating counterclaims. 245 S.W.3d 488, 507 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The Houston Court of Appeals then made a detailed analysis of Dollar’s case (discussing witness testimony, evidence, etc.) to show “the claims and counterclaims depend upon many of the same essential facts, using the same documents and witnesses, and Dollar had to defeat 7979’s claims ‘before it could recover.’” Id. at 507-08. The court finished by saying: “On the record before us, we conclude Dollar was not required to segregate the attorneys’ fees it incurred to prosecute its breach of contract claim from the fees incurred to defeat 7979’s counterclaims.” Id. at 508.

However, consider Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P., (Chevron II), a complicated case on its second appeal.56 No. 09-14-00316-CV, 2017 Tex. App. LEXIS 8952 (Tex. App.—Beaumont Sept. 21, 2017, no pet.) (mem. op.) In this case, Kingwood Crossroads (“KCR”) brought a breach of contract claim and Chevron (“CP Chem”) responded with a counterclaim under the same contract (as well as a declaratory judgment action). In Chevron I, the Fourteenth Court of Appeals remanded the case with instructions to the trial court to (a) segregate fees between KCR’s unsuccessful prosecution of its breach of contract action from its successful defense of CP Chem’s breach of contract counterclaim, which made KCR a prevailing party under the contract,57 or (b) determine segregation was unnecessary. The trial court determined the latter declaring that “all of the legal services performed by KCR’s counsel in advancement of KCR’s affirmative breach of contract claim against CP Chem also advanced KCR’s defense of CP Chem’s breach of contract claim against KCR.” Id. at *13. The Chevron II court described this as the “double duty” standard (i.e. all work equally applying to the prosecution and the defense), which appears to be supported by Chapa, but the Chevron II court rejected or, at a minimum, clarified the double duty standard and required KCR present additional proof on remand. The Beaumont


57 This was not a Chapter 38 case.
Court of Appeals noted that the trial court was required to look at discrete tasks, not the work as a whole. *Id.* at *16. The Beaumont Court of Appeals recognized that *Chapa* permitted recovery for services that advance more that one claim, i.e. services that “do double service.” *Id.* at *16-17 citing *Chapa*, 212 S.W.3d at 313. Apparently, the Beaumont Court of Appeals was dubious that “all” of KCR’s fees did a double service. It explained:

In other words, we question the trial court's apparent “double duty” standard of segregation, which would allow a party to recover all its attorneys’ fees incurred in asserting unsuccessful claims, just so long as it successfully defended a related counterclaim. Such a standard ignores the requirement that before recovering fees incurred in pursuing an unsuccessful claim, the claimant must show that the fees “would have been incurred on a recoverable claim alone.” *Chapa*, 212 S.W.3d at 311. This additional requirement serves to prevent recovery of fees that were not necessary to achieving success on a recoverable claim.

*Id.* at 17-18. After reviewing KCR’s evidence as well as CP Chem’s controverting evidence, the Beaumont Court of Appeals elucidated:

As an example, KCR filed eleven versions of its petition in the trial court, which included five theories of breach of contract claims for which it sought affirmative claims for damages against CP Chem, set forth in about 100 paragraphs. As noted by the Texas Supreme Court, some evidence of segregation is required concerning even the drafting of a petition that includes both causes of action for which fees are recoverable and those for which fees are not. *See Chapa*, 212 S.W.3d at 313.

*Id.* at *22-23. Thus, KCR was required to present some proof of segregation between prosecution of its breach of contract and its defense of CP Chem’s counterclaim.

**(i.) PRACTICE POINTER: Consideration for Fees Related to Affirmative Defenses and Counterclaims**

Given the court’s analysis in *7979 Airport Garage*, the legal proposition that a claimant need not segregate fees related to defeating defenses and counterclaims may not be absolute; rather, it may be factually dependent. Therefore, you should be prepared to support the legal proposition with an analysis of your witnesses’ testimony, exhibits, and other evidence. Also, there theoretically could be a counterclaim or cross-claim defeated that is not necessary for the claimant to win its underlying recoverable claim. Under those circumstance, the fees should be segregated. It is much harder to imagine an affirmative defense that would not have to be defeated in order to prevail on the underlying recoverable claim, assuming it is directed at that claim and not an unrecoverable claim.

**(b) Segregating by Defendant**

In *Stewart Title*, the Texas Supreme Court began by recognizing that Texas law required segregation of fees by defendants, particularly where one had settled prior to trial. 822 S.W.2d 1, 10-11 (Tex. 1991). Specifically, the Texas Supreme Court explained:
When a plaintiff seeks to recover attorney’s fees in cases where there are multiple defendants, and one or more of those defendants have made settlements, the plaintiff must segregate the fees owed by the remaining defendants from those owed by the settling defendants so that the remaining defendants are not charged fees for which they are not responsible.

Arguably, there are other circumstances in which one defendant should not be responsible for the fees of another defendant. For instance, a later-added defendant arguably should not bear the cost of earlier parts of the litigation. Obviously, if the claimant has not asserted a recoverable claim against a defendant, it should not be responsible for fees.

Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., is an excellent example of circumstances in which segregating fees by defendant is necessary and well done by the claimant. See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 845-48 (Tex. App.—Dallas 2014) aff’d in part, rev’d in part, 544 S.W.3d 724 (Tex. 2018). In that case, the claimant, a law firm seeking recovery of fees from four separate sets of interrelated clients arising from four separate pieces of litigation, segregated fees by each set of jointly and severally liable defendants. Unfortunately, the Dallas Court of Appeals found one set of defendants were not jointly and severally liable and, as a result, remanded the case as the claimant’s proof “does not segregate those fees as to the two defendants.” Id. at 848.

(i.) Possible Exception for Jointly and Severally Liable Defendants

In Anglo-Dutch Energy, LLC v. Crawford Hughes Operating Co., 2017 Tex. App. LEXIS 9424* (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (mem. op.), the failure to segregate by defendant (the prevailing party seeking attorneys’ fees under a contractual provision) was cured by requesting a new trial and stipulating with the defendants on each defendant’s share at the new trial. However, in its Appellee’s brief, the defendant argued that it did not need to allocate or apportion fees among plaintiffs as they were jointly and severally liable for the fees. See Appellee’s brief at pp. 13-14 and 20. Specifically, the defendant argued:

See e.g., Roland v. General Brick Sales, Inc., 818 S.W.2d 896, 898 (Tex. App.—Fort Worth 1991, no writ) (affirming judgment awarding attorneys’ fees jointly and severally because claims arose out of same facts); Moon Sun Kang v. Derrick, No. 14-13-00086-CV, 2014 WL 2048424, at *11–13 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied) (affirming judgment award (affirming attorneys’ fees jointly and severally because claims and counterclaims were interrelated and arose from same contract); In re Estate of Bean, 206 S.W.3d 749, 765 (Tex. App.—Texarkana 2006, pet. denied) (holding that attorneys’ fees need not be segregated between defendants with non-divergent interests); AU Pharm., Inc. v. Boston, 986 S.W.2d 331, 337 (Tex. App.—Texarkana 1999, no pet.) (“Work performed on the breach of contract claim against Ivy would appear to entail proof of essentially the same facts as the breach of contract claim against AU and may not need to be segregated….” (emphasis added)); Biopolymer Eng’g v. ImmuDyne, Inc., 304 S.W.3d 429, 446 (Tex. App.—San Antonio 2009, pet. withdrawn) (holding that plaintiff was not required to segregate attorneys’ fees between three defendants because claim against three
defendants arose from the same transactions and facts); see also Ins. Alliance v. Lake Texoma Highport, LLC, No. 05-12-01313-CV, 2014 WL 6466851, at *9–10 (Tex. App.—Dallas 2014, no pet.) (affirming award of all attorneys’ fees against one of the two defendants where claims against both defendants arose out of same transaction and were based on a single injury).

Id. at 21-22. The Houston Fourteenth Court of Appeals did not address this argument as it sided with Crawford on other issues. Further, several of the cases upon which Crawford relied are pre-Chapa. In another contract case, that court found that two of the plaintiffs were jointly and severally liable as “non-prevailing parties” for the defendant’s successful defense of a breach of contract case in which the contractual provision allowed recovery of fees against the “non-prevailing party.” See Range v. Calvary Christian Fellowship, 530 S.W.3d 818, 823 and 841 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Although not explicitly stated, the Houston Fourteenth Court of Appeals concluded that parties suing (or, presumably, being sued) under the same contract are jointly and severally liable for the successful parties attorneys’ fees.

(c) Contractual Provisions Impacting Segregation

In www.urban-inc. v. Drummond, the Houston First Court of Appeals considered the extent to which segregation of fees was required under a contractual provision awarding attorneys’ fees to “the prevailing party in any legal proceeding brought as a result of a dispute under this agreement or any transaction related to this agreement . . . to recover from the non-prevailing party all costs of such proceeding and reasonable attorney’s fees.” 508 S.W.3d 657, 672 (Tex. App.—Houston [1st Dist.] 2016). The court began its analysis with the language of the contract to determine the parties’ intent on what fees would be recoverable. The contract awarded fees to the prevailing party in any “legal proceeding,” which term was not defined and, therefore would be given its ordinary and generally accepted meaning (which certainly included a “lawsuit”). Id. However, as the contractual provision permitted recovery only against the “non-prevailing party” and Urban was not a “non-prevailing party” in Drummond’s third-party claims against the officers and employees, those fees had to be segregated. Id. Otherwise, Drummond was entitled to recover all of his fees related to the lawsuit between himself and Urban. Thus, a contractual provision can effectively do away with the segregation requirement.

Similarly, the language in the contract (an indemnity agreement) in Republic Capital Grp., LLC v. Roberts, was found to be broad enough to encompass all work performed on the case and, therefore, the plaintiff did need to segregate fees between defendant or between recoverable and unrecoverable claims. No. 03-17-00481-CV, 2018 Tex. App. LEXIS 8703, at *19-23 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op.). With respect to the parties identified, the specific language of the indemnity provision identified everyone conceivably involved in the transaction, providing:

including all affiliates, owners, officers, directors, members, partners, shareholders, employees, contractors, servants, and any other person(s) acting under the parties’ direction and/or control, the parties' independent contractors, and successors and assigns, and all persons, natural or corporate, in privity with them or any of them . . . .
While the nexus language stated:

\[
\text{from any and all expenses, claims, demands, liabilities and causes of action of any kind whatsoever, arising directly or indirectly from: (A) the above Dispute . . . . The arising directly or indirectly from the dispute covered all the causes of action.}
\]

\text{Id. at *19-20.}

**(d) Segregating By Estimating a Percentage Attributable To Unrecoverable Claims**

In \textit{Chapa}, the Texas Supreme Court suggested that Chapa’s attorney could have merely opined as to what percentage of her fees went to unrecoverable work.

Here, Chapa’s attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim. The court of appeals could then have applied standard factual and legal sufficiency review to the jury’s verdict based on that evidence.

\textit{Chapa}, 212 S.W.3d at 314 (Tex. 2006). Supporting its position, the court cited ample precedent reflecting acceptable segregation by estimating a percentage:

\textit{See, e.g., Stewart Title Guar. Co. v. Aiello}, 941 S.W.2d 68, 73, 40 Tex. Sup. Ct. J. 290 (Tex. 1997) (noting that claimant’s attorney “testified that approximately twenty-percent of his time and fifteen-percent of his paralegal’s time concerned issues predating the agreed judgment”); \textit{Med. Specialist Group, P.A. v. Radiology Assocs., L.L.P.}, 171 S.W.3d 727, 738 (Tex. App.—Corpus Christi 2005, pet. denied) (“In his affidavit, Radiology Associates’ counsel . . . testified that his fees for the defense of the case totaled $460,087.00, and approximately forty percent of these fees were directly related to Saratoga’s antitrust claims.”); \textit{Flagship Hotel}, 117 S.W.3d at 566 n.7 (“Flagship argues that the segregation standard is difficult to meet. We disagree and note that segregated attorney’s fees can be established with evidence of unsegregated attorney’s fees and a rough percent of the amount attributable to the breach of contract claim. \textit{Schenck v. Ebby Halliday Real Estate, Inc.}, 803 S.W.2d 361, 369 (Tex. App.—Fort Worth 1990, no writ); accord, \textit{Bradbury v. Scott}, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied).”)

\textit{Id. at 314 n.83.} If not for being cited with approval by the Texas Supreme Court, one would have to question these cases continuing viability as they pre-dated \textit{Chapa}’s mandate for segregation by discrete legal services. These cases as well as \textit{Chapa}’s percentage estimation analysis seem at odds with the \textit{Chapa} decision’s previously articulated emphasis on discrete legal tasks or services, in which only those tasks that are solely directed at advancing an unrecoverable claim need to be segregated. Here, in the very same opinion, the Texas Supreme Court looks at what many would consider a discrete task, i.e. drafting a petition. Under the discrete legal services analysis, the entire fee for drafting the petition should be recoverable as it does not solely advance an unrecoverable
claim. However, this section suggests that even that task needs to be divided, but a good faith estimate will suffice.

In *Westergren*, the Houston Fourteenth Court of Appeals suggested that a percentage estimate might have salvaged Westergren’s attorneys’ fees claim, saying: “[T]he evidence of the amount of recoverable attorney’s fees is sufficiently segregated if, for example, the attorney testifies that a given percentage of the drafting time would have been necessary even if the claim for which attorney’s fees are not recoverable had not been asserted.” 409 S.W.3d at 138. So, at least some of the courts of appeals believe that a percentage estimate could satisfy the segregation requirement.

Likewise, in *Barnett v. Schiro* the plaintiff’s attorneys’ fees expert testified from a summary of his contemporaneous billing records and opined that prior to the trial court granting a summary judgment on the defendant’s counterclaim that 30% of the work on the file was for non-recoverable claims (like defending the counterclaim); however, after the summary judgment on those claims, 100% of the time was on recoverable claims. No. 05-16-00999-CV, 2018 Tex. App. LEXIS 235 at *28-29 (Tex. App.—Dallas Jan. 9, 2018, pet. filed), rev’d, 2019 Tex. LEXIS 386 (Tex. Apr. 26, 2019). Citing *Chapa* and a couple of more recent Dallas Court of Appeals’ decision, that court found that Schiro’s counsel’s estimate constituted some evidence (particularly when Barnett did not cross examine Schiro’s counsel on this point or present controverting evidence) defeating the legal sufficiency challenge. *Id.* at *29. See also *Enterprising Gals of Tex., L.L.C. v. Sprehe*, No. 02-17-00063-CV, 2018 Tex. App. LEXIS 5785, at *4-10 (Tex. App.—Fort Worth July 26, 2018, no pet.) (mem. op.) (a Texas Theft Liability case in which the appellate court found sufficient evidence of segregation where appellees submitted their invoices, which showed tasks, time, biller, and rate; and their expert testified, without being controverted, that the central issue was the TTLA, everything was intertwined, appellees had cut some of their time, and 80% was for work on recoverable claims); *Berryman’s S. Fork, Inc. v. J. Baxter Brinkmann Intern. Corp.*, 418 S.W.3d 172, 202 (Tex. App.—Dallas 2013, pet. denied) (also using the 80% figure); and *Anani v. Abuzaid*, No. 05-16-01364-CV, 2018 Tex. App. LEXIS 4141, at *26-29 (Tex. App.—Dallas June 7, 2018, no pet. h.) (mem. op.) (finding applicants segregating of fees to be proper where the applicant discounted different law firms representing applicant by 15-40% with one firm, which was the last hired and giving an additional 5% to account for duplication).

However, in *United Services Automobile Association v. Hayes*, claimants’ counsel attempted to opine regarding a percentage (in fact, the exact percentages that the Texas Supreme Court used in its example) and the Houston First Court of Appeals would have none of it. See 507 S.W.3d 263 (Tex. App.—Houston [1st Dist.] 2016, pet. granted, judm’t vacated w.r.m.). The Hayeses’ attorney submitted a “fee recap” (presumably a summary of contemporaneously recorded time), but it did not contain any sort of reduction or segregation of time for causes of action for which attorneys’ fees are not recoverable. However, the Hayeses’ attorney explained that the various causes of action were intertwined and estimated that 5% of their time was attributable solely to the causes of action for which attorneys’ fees are not recoverable. The party seeking attorneys’ fees has the burden to prove it has properly segregated them. Despite the Hayeses’ assertion that their attorney had satisfied *Chapa*’s standard, the court of appeals pointed out that:

In regard to segregating their attorney’s fees, the Hayeses assert that [their attorney] opined “that five percent of the attorney’s fees were attributable to [their] common law causes of
action.” However, the record reveals that [the Hayeses attorney] did not opine regarding the fees attributable to the Hayeses’ specific claims in this case. Rather, he testified that he simply “always” estimates “five percent.” Although an opinion stating that, “for example, 95 percent of . . . drafting time would have been necessary even if there had been no fraud claim” will suffice, [the Hayeses attorney] did not demonstrate that he took into account any of the actual work performed or the claims made in the Hayeses’ case. See Chapa, 212 S.W.3d at 314 & n.83; see also 7979 Airport Garage, L.L.C., 245 S.W.3d at 506 (holding segregation of fees requires some consideration of component tasks).

Id. at 285. Thus, if you are going to argue a percentage, you must do it on a case-by-case and task-by-task basis or it is subject to reversal.

(e) Segregating by Excluding All Time Solely Related to Unrecoverable Claims

In Lion Co-Polymers Holdings, LLC v. Lion Polymers, LLC, the court found that the prevailing party had adequately accounted for segregating its fees when its expert testified that he only submitted time related to the recoverable claim, fully redacted from the submitted contemporaneous billing records all time spent solely on the unrecoverable claims, and had not relied on those numbers in calculating his fees. Lion Co-Polymers Holdings, LLC v. Lion Polymers, LLC, No. 01-16-00848-CV, 2018 Tex. App. LEXIS 4835, at *44 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. filed) (mem. op.). He also testified that the remaining time was “‘remaining hours were reasonably and necessarily intertwined with’” with the recoverable claim. Id. Notably, none of his testimony was controverted.

3. Preserving Error on Failing to Segregate Fees

The Houston Fourteenth Court of Appeals recently reviewed cases establishing when an objection must be raised regarding segregating attorneys’ fees. See Home Comfortable Supplies, Inc. v. Cooper, 544 S.W.3d 899 (Tex. App.—Houston [14th Dist.] 2018, no pet.) Although Home Comfortable Supplies involved a bench trial, the court recognized that “It is well-established that in a case tried to a jury, an objection to the failure to segregate is preserved if raised in an objection to the charge.” Id. at 908. The court later recognized that, in a jury trial, the complaint may also be made by objection during testimony as well. Id. at 910. However, with respect to a bench trial, the court recognized a split in authority with courts accepting the following:

- the objection must be raised when the fee testimony and billing records are offered as evidence;
- an objection to the failure to segregate can be raised in a post-judgment motion, although some courts have found that a post-judgment motion does not preserve the complaint instead finding that the objection that attorney’s fees are not segregated as to specific claims must be raised before the trial court issues its ruling; and
- while a request for additional findings of fact and conclusions of law did not preserve the complaint, a post-judgment challenge to the legal and factual sufficiency of the evidence, for which there are no preservation requirements in non-jury trial.58

58 While not a segregation case, In the Interest of K.T.P., found an objection to the movant’s affidavit made for the first time in non-movant’s motion for new trial preserved error, in part due to the fact that movant had not provided
The court determined that it need not resolve the dispute as the appellants first raised their objection to Cooper’s failure to segregate in their closing argument (and later in a motion to modify the judgment). The Houston Fourteenth Court of Appeals found that appellants’ counsel’s statements during closing argument were sufficient to preserve error under any of the standards as the complaint was raised both before the fees were awarded and in a post trial motion. Id. at 910.

Citing Home Comfortable Supplies and discussing the split in authority, the Dallas Court of Appeals held that, in a bench trial, filing an objection to the prevailing party’s failure to segregate fees after the evidence was closed, trial had concluded, and the trial court ruled, but prior to the trial court rendering a final judgment was timely, particularly considering that the trial court dealt with the objection in a letter. See Anderton v. Green, 555 S.W.3d 361, 372 n.4 (Tex. App.—Dallas 2018, no pet.) While siding with Home Comfortable Supplies, the Dallas Court of Appeals specifically noted that “some courts have ruled that an objection to failure to segregate must be made ‘before the trial court issues its ruling.’” Home Comfortable Supplies, 544 S.W.3d 899, 909 (quoting Huey-You v. Huey-You, No. 02-16-00332-CV, 2017 Tex. App. LEXIS 8750, at *7 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.).) However, without mentioning Home Comfortable Supplies or the split in authority, the Austin Court of Appeals in reviewing a bench trial overruled the appellant’s objection to appellee’s failure to segregate and held that “[r]aising the segregation issue for the first time in a motion for new trial does not preserve error.” Barton Food Mart v. Botrie, No. 03-17-00292-CV, 2018 Tex. App. LEXIS 8673, at *26-27 (Tex. App.—Austin Oct. 25, 2018, pet. denied) (mem. op.) (quoting Lawson v. Keene, No. 03-13-00498-CV, 2016 WL 767772, at *5 (Tex. App.—Austin Feb. 23, 2016, pet. denied)). See also Pac. Energy & Mining Co. v. Fid. Expl. & Prod. Co., No. 01-17-00594-CV, 2018 Tex. App. LEXIS 5586, at *26-28 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet.) (mem. op.) (holding that failure to object to a failure to segregate prior to entry of summary judgment waives error).

In Lederer v. Lederer, the Houston Fourteenth Court of Appeals rejected the plaintiffs’ argument that the defendant had waived his segregation argument by failing to object to plaintiffs’ attorneys’ fees expert’s testimony at trial or the admission of his firm’s fee statements. 561 S.W.3d 683, 700-701 (Tex. App.—Houston [14th Dist.] Aug. 30, 2018, no pet.) (citing Home Comfortable). The court concluded error had been adequately preserved where defendant (a) not only elicited testimony from the plaintiffs’ expert that the expert made no effort to segregate fees because “the work” was “inextricably intertwined,” (b) also mentioned segregation during closing argument and informed the trial court that he would be submitting a trial brief on the issue, and (c) prior to the trial court’s rendition of judgment, filed his brief, in which he objected to the plaintiffs’ failure to segregate their fees. Id. Further it appears that the trial court understood that defendant was challenging the plaintiffs’ failure to segregate their fees. Id.

In most cases, the applicant adduces at least some evidence of attorneys’ fees. In that case, evidence of the unsegregated amount is some evidence of proper segregated amount, which is enough to overcome a legal insufficiency challenge. Stover v. Adm Milling Co., No. 05-17-00778-the affidavit prior to the hearing and the court entered the order awarding attorneys’ fees shortly after receiving its copy of affidavit after the hearing. Thus, non-movant had no time to interject an objection prior to the court’s ruling. No. 05-17-00922-CV, 2018 Tex. App. LEXIS 10752, at *14-15 (Tex. App.—Dallas Dec. 21, 2018)(mem. op.).

(a) PRACTICE POINTERS: When to Object

To be safe in a jury trial, if you are opposing attorneys’ fees, you should object and raise your specific complaint regarding segregation during the testimony for introduction or documenting evidence, object to the charge, and object in post-trial motions, including a motion for new trial or other motion preserving your factual sufficiency challenge. Likewise, in a bench trial, object during the presentation of evidence, in any closing argument, and in post-trial motions.

4. Appellate Fees Should Be Segregated

In *Cullins v. Foster,* the court recognized that appellate fees should be segregated as well. 171 S.W.3d 521, 540 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Of course, if the claimant has abandoned his unrecoverable claims prior to trial (voluntarily, by summary judgment, or settlement), then he can argue that he need not segregate his appellate costs. If you fail to object at the time of trial (or, at least in post-verdict or judgment motions) to the appellate fees not being recoverable, that point or error is waived as it cannot be raised for the first time on appeal. *See Garcia v. Baumgarten,* No. 03-14-00267-CV, 2015 Tex. App. LEXIS 7878, at *19 n.4 (Tex. App.—Austin July 30, 2015, no pet.) (mem. op.)

In *Chevron II,* the Beaumont Court of Appeals directed the trial court on remand to limit the prevailing party’s attorneys’ fees to those issues upon which it was successful on appeal. 2017 Tex. App. LEXIS 8952 at *26-28. It declared:

> The segregation requirement applies to appellate attorneys’ fees as well as trial fees. “[A] party should not be penalized for taking a successful appeal.” Accordingly, “[a]n appellee may not recover attorney’s fees for work performed on any issue of the appeal where the appellant was successful.” Rather, he may only recover “fees for work performed on any issue of the appeal where the appellant was unsuccessful.”

*Id.* at *27. The Beaumont Court of Appeals noted that, in *Chevron I,* the prevailing party had succeeded on only partially on one of the three appellant’s issues and none of its own three cross-points. Therefore, the trial court was to take this into consideration when allocating appellate fees.

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59 Motions for rehearing en banc filed April 8, 2019.
5. Unsegregated Fees Result In Remand, Not Rendition

Unlike a failure to present, a failure to segregate fees does not result in a reverse and render of the fee award. As long as the claimant proffers legally sufficient proof of his unsegregated fees, the courts will remand to determine proper segregation. They will not render. In Sterling, when faced with the question of the proper appellate relief, the Texas Supreme Court recognized that: “This court, however, has held that an award of attorney’s fees erroneously based upon evidence of unsegregated fees requires a remand.” Sterling, 822 S.W.2d at 11 (citing International Security Life Ins. Co. v. Finck, 496 S.W.2d 544, 546-547 (Tex. 1973)). Chapa also reached the same decision, saying “an unsegregated damages award requires a remand.” 212 S.W.3d at 314. See also Kinsel v. Lindsey, 526 S.W.3d 411, 428 (Tex. 2017). In fact, this may be the only legal principle addressed in this paper that is wholly undisputed.60

6. Curing Unsegregated Fees with Remittitur

The only way to avoid remand for failure to segregate appears to be accepting remittitur. See, e.g., Enzo Investments, LP v. White, 468 S.W.3d 635, 650-655 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (finding that one of White’s three attorneys failed to adequately segregate his fees, recognizing that the Texas Supreme Court authorized and suggested remittitur in the right cases, and, as a result, recommending (and White accepting) a remittitur to the total fees of the other two attorneys).

While not involving segregating fees, Range v. Calvary Christian Fellowship, 530 S.W.3d 818, 840-841 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) involved Calvary Christian’s agreement to remittitur to salvage an attorneys’ fees award without the necessity of remand. In that case, the jury awarded fees exceeding the fees actually proved up using lodestar supported by contemporaneous billing records (and about which the Range’s attorneys’ fees expert acknowledged were reasonable and necessary). As it turned out, the jury awarded the identical amount (the amount proved by Range for his fees, which was the larger amount) to both parties. While the Houston Fourteenth Court of Appeals rejected the argument that “even if evidence were legally and factually sufficient to support [Range's] requested attorneys’ fees …, evidence of one side’s reasonable and necessary attorneys’ fees is not evidence of the opposing side’s reasonable attorneys’ fees. Id. (citing Dilston House Condo. Ass’n v. White, 230 S.W.3d 714, 717 (Tex. App.—Houston [14th Dist.] 2007, no pet.)). Given the election of lodestar (which creates a presumption of reasonableness), the submission of the contemporaneous billing records, and Range’s concession, the appellate court accepted Calvary Christian’s offer to remit.

60 As long as there is legally sufficient proof of attorneys’ fees, almost any deficiency will result in remand. See generally City of Laredo v. Montano, 414 S.W.3d 731, 737 (Tex. 2013) (deficiencies in proof of Arthur Andersen factors); Long v. Griffin, 442 S.W.3d 253, 254-56 (Tex. 2014) (deficiencies in lodestar proof); and El Apple I, Ltd. v. Olivas 370 S.W.3d 757, 763 (Tex. 2012) (lodestar proof deficiencies).
7. PRACTICE POINTERS

(a) Entry-By-Entry Segregation

This muddled case law creates a real problem for the practitioner and trial courts. Some courts of appeals strictly follow Chapa. Others do not and revert to Sterling-esque analysis. You cannot predict which will prevail and can only be prepared to argue both sides. That said, if you are claiming attorneys’ fees, you can never go wrong acknowledging the need to segregate and parsing your attorneys’ fees entry-by-entry. That will comply with the most stringent standard under Chapa. To do so, at the outset of the litigation, identify your recoverable and unrecoverable causes of action (which may include defense of counterclaims) and, set up a system for designating each tasks in your time entry as recoverable, mixed, or unrecoverable. If you have multiple defendants, identify each as well, set up a designation for each, and mark each entry as to which defendant it applies. This will allow you to set up a spreadsheet at the end of the case to segregate fees by claims and defendants. If you wait until the discovery deadline or your expert designation deadline to set up a system, the project will be overwhelming (and possibly cost prohibitive) and you will find every excuse to argue that all of your fees are inextricably intertwined, at which point you will be at the vagaries of whether the court correctly applies the law or reverts to Sterling.

Meeting the most stringent standard avoids delay and expense later. Post-trial motions, appeals, and remands for a new trial on attorneys’ fees can result in unnecessary delay and expense to the client. In order to avoid delay and expense, some clients opt for settlement or accepting remittitur, if offered. Do you want to be the attorney who recommends that your client give up a significant part of its award because you failed to properly segregate your fees? Conversely, if you are the debtor/defendant and your opponent has a viable recoverable claim, but failed to properly segregate, do you wish to go through the cost of the same post-trial briefing, appeal, and possible remand just for attorneys’ fees. If liability is relatively clear, consider offering what your detailed analysis reveals is the proper segregated amount or move for remittitur. This could put your opponent in a bind.

(b) Estimate Only If You Have To

In your fee application or testimony, acknowledge that you must segregate by task and make every effort to do so task-by-task. If all else fails and you have simply done nothing to segregate your fees (and it is almost impossible to do so from your entries), calculate a percentage based on the specific circumstances of your case (do not fall prey to the 5% assertion simply because the Texas Supreme Court used it in Chapa as the Hayeses’ counsel did in United Services Automobile Association) and do you best to back it up with specific examples.

(c) Also Keep Track Of Your Unrecoverable Time

Keep track of your segregated unrecoverable time. You will want to prove to the court that you had such time and did not include it in your fee application. Courts seem to give greater deference to claimants who acknowledge that they owe a duty to segregate and can prove that they have indeed done so. Consider making your recoverable fees one exhibit and your unrecoverable fees a separate exhibit. If you are introducing your invoices or statements, consider highlighting or
otherwise obviously designating your unrecoverable fees. Add them up and let the court know how much you discounted. At a minimum, follow the example in *Finserv Cas. Corp. v. Transamerica Life Ins. Co.*, in which the claimant introduced contemporaneous billing records (the firm’s monthly statements) and whited out the unrecoverable work. 523 S.W.3d 129, 142 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). If your unrecoverable amount is significant by percentage or amount, we think it is more persuasive to show that making the point concretely.

**(d) Start Putting Together Objectionable Time Entries Early**

If you are defending against a claim for fees, insist on the court applying *Chapa*. Most claimants will have failed to do what they need to do on a task-by-task, claim-by-claim, defendant-by-defendant basis. Assign a paralegal or associate to dig through the contemporaneous billing records (which by now everyone will be introducing after having read this paper). Have them identify examples of unrecoverable fee entries that have not been segregated. Follow the example in *Permian Power Tong, Inc. v. Diamondback E&P, LLC*, in which Permian objected to Diamondback’s attorneys’ fees application, analyzed the billing invoices Diamondback’s attorney provided, and submitted an exhibit consisting of an itemized list of unrecoverable fees totaling over $20,000. 550 S.W.3d 642, 665-66 (Tex. App.—Tyler 2017, pet. denied). Diamondback did not respond to Permian’s exhibit, although Diamondback’s attorney did testify that he was aware of the requirement to segregate, but that he believed none of the submitted charges relate solely to claims for which attorneys’ fees are unrecoverable. The Tyler Court of Appeals found otherwise.

Another example of detailed objections to plaintiffs’ fee application can found in *Atrium Med. Ctr., LP v. Hous. Red C LLC*, 546 S.W.3d 305, 316-318 (Tex. App.—Houston [14th Dist.] 2017, pet. filed). This was a bench trial with a judgment supported by findings of fact and conclusions of law. The plaintiff sought and was awarded $110,000 in attorneys’ fees, despite its expert testifying that 10% of the fees were attributable to tasks pursuing unrecoverable claims or defendants. The defendant challenged the plaintiff’s application. First, it presented evidence that $11,473.50 (i.e. more than 10%) in fees were attributable to pursuit of claims against individual defendants from whom plaintiff did not recover. Second, the defendant presented evidence that a significant amount of time related to an unrecoverable ancillary matter. The plaintiff did not reply to the defendant’s evidence and, as such, it went unrebutted. As a result, the appellate court required a remand for the trial court to consider segregation. Once again, consider responding to the defendant’s controverting proof.

**(e) Tasks vs. Facts**

If a court acknowledges that segregation should be based on tasks, but muddles the analysis by essentially holding that the common set of facts from which all of the plaintiff’s theories flowed made the fees non-segregable, you need to be ready to argue both sides. If you are on the side of arguing for fees, stress the commonality of facts. If you are opposing fees, stress tasks and how some part of it can be segregated. Of course, both sides should be mindful of the other argument.
(f) Should You Plead The Unrecoverable Action?

Consider whether you really need to plead an unrecoverable cause of action. This is the ultimate way to avoid a segregation issue. What does it really add? Another element of damages (are they ultimately recoverable, will they invariably draw an appeal); is it the only means of obtaining some discovery; is it the only theory for introducing some case altering evidence? How likely are you to actually take the cause of action to verdict? If not, consider not pleading. Alternatively, consider waiting until the pleading deadline to decide whether to add it if it is nothing more than an alternative theory based on the same inextricably intertwined set of common facts (as is always argued).

(g) Hard Line Approach to Segregation

If you are trying to draw a hard line on segregation in order to drive down claimant’s attorneys’ fees, combine the percentage analysis from *Chapa* with extensive portions of the deposition language in *Lindemann* and the single paragraph language in *7979 Airport*. Develop concrete examples of how many pages in a deposition dealt with unrecoverable claims or defenses to those claims, how much of claimant’s pleadings advance unrecoverable claims or defeating defenses to those claims, and argue for the highest percentage you can get the claimant’s attorneys’ fees expert to concede.

(h) Appellate Fees

Do not forget to segregate your estimated appellate fees or explain why you need not do so. Here, a percentage estimate makes sense. Conversely, if you are the debtor/defendant and the claimant does not segregate his appellate fees, object, cross-examine, and put on controverting evidence.

(i) Request Findings of Fact and Conclusions of Law on Segregation

If you try the attorneys’ fees issue to the bench, be sure that you obtain a finding of fact and conclusion of law on segregation in order to avoid remand. In *Atrium Med. Ctr.*, 2546 S.W.3d at 316-318, the plaintiff sought and the trial court awarded $110,000 despite the plaintiff’s expert opining that 10% of the fees were performed on unrecoverable tasks. The appellate court remanded for further consideration of segregation in part due to the trial court’s failure to address segregation in its findings of fact and conclusions of law.

Among other findings of fact and conclusions of law, you should seek a statement as to whether segregating fees is factually and legally necessary under the circumstances of your case.

If you have taken the position that fees need not be segregated, alternatively consider putting on proof as to what fees arguably should have been segregated for unrecoverable claims, unsuccessful claims, settled or successful defendants, etc. Then ask for an alternative set of findings of fact and conclusions of law whereby the trial court alternatively finds the amount that it would have segregated. This may allow you to argue for rendition on appeal. Given the state of the law on segregating fees, this might save you a second trial.
However, be aware of the prevailing view that appellate courts almost always remand and rarely render on attorneys’ fees issues. See Tatum v. Hersh, 559 S.W.3d 581, 586-587 (Tex. App.—Dallas 2018, no pet.) (a Texas Citizens Participation Act case reviewing the rendition versus remand jurisprudence under that statute). In Tatum, the Dallas Court of Appeals acknowledged one case in which

[T]he El Paso Court of Appeals has held that the appellate court can render judgment for fees if the fee evidence is clear, direct, positive, uncontroverted, unimpeached, and not discredited. Sierra Club v. Andrews Cty., 418 S.W.3d 711, 720-21 (Tex. App.—El Paso 2013), rev'd on other grounds, 463 S.W.3d 867 (Tex. 2015) (per curiam).

Id. at 586. However, the Dallas Court of Appeals sided with the trend, which required remand, citing and relying on the analysis in Cox Media Grp., LLC v. Joselevitz, 524 S.W.3d 850, 865 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (which also involved an improper denial of uncontested, uncontroverted trial fees).

(j) Offer to Remit

If you recovered unsegregated fees and are having any concerns, offer to remit. This can be done at the trial or appellate level and could cure the error.

(k) If All Else Fails, Seek a New Trial to Cure Segregating Errors

In Anglo-Dutch Energy, the Working Interest Owners (plaintiffs/counter-defendants) complained that the trial court erred in granting a new trial to the Operator to allow it to cure its failure to segregate by claim and defendant. Anglo-Dutch Energy, 2017 Tex. App. LEXIS 9424 at *4, 6, and 9-10. In their Appellant’s brief, the WIO claimed that Chapa does not stand for the proposition that a party who makes a strategic decision in its presentation of evidence not to segregate should be allowed to cure that error by obtaining a new trial. The Houston Fourteenth Court of Appeals rejected this argument explaining, “Because this challenge does not fall within one of the narrow exceptions identified by the Supreme Court of Texas, we lack appellate jurisdiction to entertain the working interest appellants’ challenge to the new trial orders.” Id. at *9. So, if you failed to segregate at trial and won, seek a new trial. If granted, the new trial is arguably unassailable. Of course, this is not a suggestion to lie behind the log and invite error; rather, this is a procedure for curing a good faith mistake.

K. Uncontroverted, Non-Conclusory Fees

1. Uncontroverted Fees Should Be Awarded As a Matter of Law

In Spivey v. Goodwin, the Waco Court of Appeals noted that none of Spivey’s attorneys’ fees evidence (invoices plus the attorney’s testimony) was contradicted or controverted, and that the trial court had abused it discretion in failing to award such fees, ultimately reforming the judgment to add the fees. See No. 10-16-00178-CV, 2017 Tex. App. LEXIS 5215, at *11-14 (Tex. App.—Waco June 7, 2017, no pet.) (mem. op.). In doing so, the Waco Court of Appeals explained:
However, when counsel’s evidence regarding his fees is uncontroverted, clear, direct and positive, and not contradicted by any other witness or attendant circumstances, and there is nothing to indicate otherwise, an appellate court may exercise its discretion and render judgment for attorney’s fees in the interest of judicial economy. See Ragsdale, 801 S.W.2d at 882; see also World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662, 684, 686 (Tex. App.—Fort Worth 1998, pet. denied) (citing Ragsdale and rendering judgment for attorney’s fees in a breach-of-contract case).

Id. at 12-13. Similarly, the Austin Court of Appeals in finding some evidence to support the trial court’s fees award in a factual insufficiency challenge recited the standard:

An attorney’s testimony on fees will be taken as true as a matter of law if it is clear, positive, direct, free from internal contradiction, and unchallenged by another witness. Id.; see Garcia v. Gomez, 319 S.W.3d 638, 642 (Tex. 2010) (discussing same rule in context of award of fees under medical liability statute).


The Texas Supreme Court in Ragsdale was more explicit that a fee application free from the above-quoted circumstances or “other reasons” casting suspicion on the fees establishes such fees as a matter of law. See Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990). “Other reasons” that may call a fee application into question could include unreasonable, incredible, or questionable evidence, but then such evidence only raises a fact issue to be determined by the trier of fact.” See id. See also Hoeffner, Bilek & Eidman, L.L.P. v. Guerra, No. 13-01-00503-CV, 2004 Tex. App. LEXIS 4792, *36-38 (Tex. App.—Corpus Christi May 27, 2004, pet. denied) (mem. op.) (reversing denial of fees, including appellate fees, and rendering judgment); Syrian Am. Oil Corp. v. Pecten Orient Co., 524 S.W.3d 350, 352 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (reversing jury’s denial of fees where testimony uncontroverted); Daily v. McMillan, 531 S.W.3d 822 (Tex. App.—Texarkana 2017, no pet.); and Moore v. Patriot Sec. Inc., No. 09-16-00182-CV, 2018 Tex. App. LEXIS 1760 at *19-20 (Tex. App.—Beaumont March 8, 2018, pet. denied) (mem. op.) (finding that an attorneys’ affidavit and supporting billing statements was sufficient as a matter of law when the opposing party presented no controverting evidence and did not challenge the reasonableness of the fee). See generally City of Keller v. Wilson, 168 S.W.3d 802, 820 (Tex. 2005, no pet.).

In a recent case, the Houston First Court of Appeals, relying principally on Ragsdale, stated:

In the event a trial court denies or minimizes the fee award, appellate courts will reverse the award and render judgment for attorney’s fees in the amount proved.

61 Note the prior discussion of this case and the use of a § 18.001 cost and necessity affidavit and supporting contemporaneous time records to establish uncontroverted evidence of fees. See supra at p. 65. V. Proving Attorneys’ Fees, I. Contemporaneous Billing Records: Traditional vs. Lodestar, 3. Other Issues, (h) Utilizing § 18.001 Cost and Necessity Affidavit to Submit Fees and Billing Records.

Focusing on the “attendant circumstances, and is otherwise free from ‘contradiction, inaccuracies, and circumstances tending to cast suspicion thereon,’” the court in C&C Rd. Constr. v. Saab Site Contractors, L.P., reversed the jury’s failure to award appellate fees, but refused to exercise its discretion to render judgment for the uncontroverted appellate fees and instead remanded the issue for further considerations due to (1) the jury compromised the plaintiff’s damages and trial fees award and (2) the uncontroverted testimony on appellate fees did not exactly correspond to the appellate stages in the jury question. No. 08-17-00056-CV, 2019 Tex. App. LEXIS 2541, at *29-36 (Tex. App.—El Paso Mar. 29, 2019, no pet. h.) (quoting Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990)). See also KKR RV’s, LLC v. Andersen, No. 01-18-00178-CV, 2018 Tex. App. LEXIS 9901, at **6-11 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet.) (mem. op.) (where trial court denied an uncontroverted fee request and the prevailing party requested rendition, the appellate court, without any real discussion of this line of cases, opted to remand the case for consideration of fees as opposed to rendering judgment in the amount of the uncontested fees) and

However, another line of cases, which was cited by the Houston Fourteenth Court of Appeals in a case in which the plaintiff was trying to prove up the reasonableness of a 40% contingency fee, holds that a factfinder may award less than the uncontested amount of fees. See Sharma v. Khan, No. 14-17-00322-CV, 2018 Tex. App. LEXIS 6457, at *24 (Tex. App.—Houston [14th Dist.] Aug. 16, 2018, no pet.) (mem. op.) (upholding an award of $38,250 when plaintiffs presented evidence that the contingency fees of $520,000 was reasonable). In affirming the trial court’s award and rejecting plaintiffs’ argument that their evidence was uncontroverted, the court explained:

Even if the evidence in this case had been uncontested, “the trial court is not bound by even uncontroverted attorneys’ fees evidence and may award less than requested.” Hall v. Hubco, Inc., 292 S.W.3d 22, 33 (Tex. App.-Houston [14th Dist.] 2006, pet. denied) (finding no abuse of discretion when the trial court did not award the amount of attorney's fees the parties stipulated as reasonable and necessary); see also Cole Chem. & Distrib., Inc., 228 S.W.3d at 689-90 (finding no abuse of discretion when the trial court awarded less attorney’s fees than the range testified to by both parties’ experts and rejecting argument that “the trial court was bound by the scope of the expert testimony”); Nat'l Mar-Kit, Inc. v. Forrest, 687 S.W.2d 457, 460 (Tex. App.-Houston [14th Dist.] 1985, no writ) (stating that “[a] court is not mandated to award attorney’s fees equal to those testified to at trial,” even when that testimony is uncontroverted).

fees from $16,000 sought to $3,000 awarded based on the trial court’s findings of fact and conclusions of law that “in awarding the attorney's fees it considered ‘the amount of money involved, the results obtained and the novelty and difficulty of the question[,]’ and that it ‘may award less than the amount testified to by the attorney.’”62; and Gee Roach v. Liat Turkia, No. 05-18-00142-CV, 2019 Tex. App. LEXIS 949, at *13 (Tex. App.—Dallas Feb. 11, 2019, no pet.) (mem. op.) (relying heavily on two pre-lodestar cases and stressing the fees must bear some relationship to the amount in controversy, which here was $20,000, fees requested $11,000, and fees awarded $3,500).63

2. Even Minimal Testimony May Suffice and Avoid Exclusion as Conclusory

In affirming an award of $225,000 in appellate fees based on little more than evidence of hourly rates involved and a projection of fees at each level, the Tyler Court of Appeals evaluated whether Diamondback’s attorney’s affidavit was conclusory. See Permian Power Tong, Inc. v. Diamondback E&P, LLC, 550 S.W.3d 642, 666-67 (Tex. App.—Tyler 2017, pet. denied). Early in the opinion while addressing other Permian complaints about Diamondback’s attorneys’ fees application, the court noted that “[e]ven brief testimony on fees is not ‘merely conclusory,’ and constitutes some evidence of reasonable fees, where the party challenging fees did not cross-examine the attorney or present any additional or controverting evidence on the issue of attorneys' fees.” Id. at 663 (citing Garcia v. Gomez, 319 S.W.3d 638, 641 (Tex. 2010)). The Tyler Court of Appeals explained that the Ragsdale exception to the uncontroverted testimony of an interested party being taken as a matter of law is especially true when opponents have the means and opportunity of disproving the testimony and fail to do so. Id. at 666 (citing Ragsdale, 801 S.W. 2d at 882). The Tyler Court of Appeals refused to find Diamondback’s attorney’s affidavit conclusory commenting: “This is especially true when, as here, opposing counsel likewise has some idea of the time and effort involved and if the matter is truly in dispute, may effectively controvert the reasonableness of the fee request.” Id. at 667 (citing Ihnfeldt v. Reagan, No. 02-14-00220-CV, 2016 Tex. App. LEXIS 12776, 2016 WL 7010922, at *16 (Tex. App.—Fort Worth Dec. 1, 2016, pet. denied) (mem. op.)).64

In another summary judgment case, the Austin Court of Appeals considered Ogle’s objection to Hector’s attorneys’ fees affidavit and distinguished between cases involving an affidavit providing some evidence and one providing no factual support:

An attorney’s uncontroverted affidavit may constitute expert testimony sufficient to support an attorney’s fee award in a summary judgment proceeding. Ten-Booms, 2011 Tex. App. LEXIS 4217, 2011 WL 2162884, at *13; Tesoro Petroleum Corp., 754 S.W.2d at

62 In her brief, Ms. Betancourt did not cite any of the cases supporting the proposition that uncontroverted fees should be awarded as a matter of law or that mere cross-examination is usually insufficient. This may not have made any difference, but such citations could have at least bolstered her position.

63 In Gee Roach, the prevailing defendant’s counsel provided two affidavits, one focused on prevailing party and the other one fees, to which he attached his contemporaneous billing records. He impliedly elected the lodestar method, which presumptively produces a reasonable fee. The plaintiff did not controvert his fee application.

64 See also the discussion comparing and contrasting the standard for supporting and controverting affidavit fraud in the following Section V. Proving Attorneys’ Fees, L. Controverted Fees 2. Controverting Testimony Cannot Be General or Conclusory infra at p. 94.
“To create a fact issue, the non-movant’s attorney must file an affidavit contesting the reasonableness of the movant’s attorney’s fee affidavit.” Owen Elec. Supply, Inc. v. Brite Day Constr., Inc., 821 S.W.2d 283, 288 (Tex. App.—Houston [1st Dist.] 1991, writ denied); see Ten-Booms, 2011 Tex. App. LEXIS 4217, 2011 WL 2162884, at *13 (“An opposing attorney’s criticism of the amount of attorney’s fees sought does not raise a fact issue regarding the reasonableness of the attorney's fees.”).

Ogle v. Hector, No. 03-16-00716-CV, 2017 Tex. App. LEXIS 7210, at *14-15 (Tex. App.—Austin Aug. 2, 2017, pet. denied) (mem. op.). The Austin Court of Appeals found that Hector’s attorneys’ fees affidavit, while sparse, provided some evidence (including years of experience, an hourly rate, which was stated to be customary, and the number of hours worked) unlike the affidavit in Eberstein v. Hunter, which provided no evidence as it proffered only the attorney’s training and experience, stated that he was hired in the subject proceeding, and opined that a reasonable fee would be $50,000. Id. at 15 (citing Eberstein v. Hunter, 260 S.W.3d 626, 630 (Tex. App.—Dallas 2008, no pet.)).

3. Opposing Party’s Objections and Motion to Strike Inadequate to Controvert If Not Sustained or Granted

In a declaratory judgment action, the San Antonio Court of Appeals found inadequate objections and a motion to strike the movant’s attorneys’ fees affidavit as summary judgment evidence to controvert her testimony on fees where the trial court never ruled on either the objections or the motion and, therefore, the affidavit, which sets forth her qualifications, her opinion regarding reasonable attorney’s fees, and the basis for her opinion was sufficient to support summary judgment as it was not otherwise controverted. See In re Macy Lynne Quintanilla Tr., No. 04-17-00753-CV, 2018 Tex. App. LEXIS 8223, at *16-20 (Tex. App.—San Antonio Oct. 10, 2018, no pet.) (mem. op.). The San Antonio Court of Appeals noted that the opposing party’s counsel did not provide controverting testimony. Id. at *19. As discussed below in the next section V. Proving Attorneys’ Fees, L. Controverted Fees, 2. Controverting Testimony Cannot Be General or Conclusory, infra at p. 94 there seems to be a double standard with respect to the sufficiency of the testimony and opinions supporting a fees application and the same for controverting it with the former being lenient and the latter more restrictive.

L. Controverted Fees

1. Controverting Testimony Requires An Expert

2. Controverting Testimony Cannot Be General or Conclusory

Where a party seeking attorneys’ fees as part of its motion for summary judgment presents an affidavit from its attorney, which attaches invoices detailing his work and the affidavit sets forth his experience and “extensive details” regarding the facts supporting the reasonableness and necessity of the attorneys’ fees incurred, the opposing party’s controverting affidavit must provide more than generalities and conclusory statements. See Carto Props., LLC v. Briar Capital, L.P., No. 01-15-01114-CV, 2018 Tex. App. LEXIS 1186* at *36-38 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. filed). In Carto Props., the opposing counsel (Holly) submitted an affidavit. Id. at *37. Briar objected to Holly’s testimony as conclusory and the Houston First Court of Appeals agreed holding that Holly’s affidavit did not raise a fact issue explaining:

An affidavit by non-movant’s counsel that simply criticizes the fees sought by the movant as unreasonable without setting forth the factual basis for the opinion is not sufficient to defeat summary judgment. See Obregon, 2 S.W.3d at 373; see also Tex. R. Civ. P. 166a(f); see, e.g., Houston v. Houston, No. 13-02-00142-CV, 2004 Tex. App. LEXIS 1834, 2004 WL 351850, *5 (Tex. App.—Corpus Christi Feb. 26, 2004, no pet.)(mem. op.) (not designated for publication) (non-movant’s attorney’s affidavit did not state movant's attorney's hourly fee unreasonable, nor identify unnecessary billable time).

Here, Holly’s affidavit, in which he asserts that the attorney’s fees sought by Briar were “unreasonable, unnecessary and . . . not incurred in good faith,” without setting forth any factual bases, is not sufficient to defeat summary judgment. See Obregon, 2 S.W.3d at 373; see also Tex. R. Civ. P. 166a(f).

Id. at 38. Courts often seem fairly lenient with proof supporting attorneys’ fees. For instance, compare Carto Props. with In the Interest of T.L.T., No. 05-16-01367-CV, 2018 Tex. App. LEXIS 2025 (Tex. App.—Dallas Mar. 21, 2018, no pet.) (mem. op.), wherein the Dallas Court of Appeals explained:

An attorney’s testimony on the total amount of fees, his experience, and the reasonableness of the fees charged is sufficient to support an award. See In re A.B.P., 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.); see also National Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 157 n. 7 (Tex. 2012) (“even conclusory attorney’s fee testimony was not objectionable, however, because ‘the opposing party, or that party’s attorney, likewise has some knowledge of the time and effort involved and if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee’”) (quoting Garcia v. Gomez, 319 S.W.3d 638, 641 (Tex. 2010)).

Id. at *11. See also Lowry v. Tarbox, 537 S.W.3d 599, 619 (Tex. App.—San Antonio 2017, pet. denied) (wherein the court noted Tarbox’s attorneys’ affidavits supporting the fee application were competent, not conclusory, citing cases for the proposition that such affidavits were not conclusory if they stated either (a) “he was a duly licensed attorney, familiar with usual and customary attorneys’ fees in the area, and based on his personal knowledge of the services rendered, the attorney's fee was reasonable” or (b) “his fees were reasonable, necessary, usual, and customary fees for the type of services involved in the instant case”).
While *In the Interests of T.L.T.* and *Lowry* suggest the supporting affidavit may be rather conclusory, *Carto Props.* requires the controverting affidavit be factually specific and detailed. Certainly, the controverting affidavit should be at least as detailed and specific as the supporting affidavit. Here, the *Carto Props.* court’s description of the two make them seem lopsided, which may have been a factor in the decision.

Another example of a controverting argument rejected as being too general can be found in *Serralde v. Flores*, No. 04-17-00078-CV, 2018 Tex. App. LEXIS 1344 at *13-14 (Tex. App.—San Antonio Feb. 21, 2018, no pet.). There, the appellant used a mathematical formula to attack the appellee’s failure to segregate fees. The appellant noted that (a) six of appellee’s seven claims were dismissed, (b) appellee could not be the prevailing party on those six claims, (c) appellee should not recover for work done on those six dismissed claims, (d) that six of seven is over 85%, and (e) therefore, appellee’s submitted fees should be reduced by 85%. *Id.* at *14. The San Antonio Court noted that the appellee had produced numerous billing records and appellee’s trial counsel testified the fees could not be segregated. *Id.* at *13-14. Citing *Chapa* for the intertwined/inseparable exception to segregating fees, the San Antonio Court of Appeals swept aside appellant’s formulaic argument saying he did not explain how the record supported his argument and proved the claims were not so intertwined/inseparable. *Id.* at *14. In fact, the San Antonio Court of Appeals found the argument failed to satisfy Tex. R. App. P. 38.1(i) (requiring an appellant’s brief to “contain a clear and concise argument for the contentions made, with appropriate citations to authorities”). *Id.* With a doubt, the appellant was correct as the appellee’s causes of action included recovery of money had and received, common law fraud, rescission of contract, breach of contract, declaratory judgment, theft, and exemplary damages, most of which are non-recoverable claims not to mention that Flores failed to prevail on almost all of them. *Id.* at *2. Surely some of the discrete tasks (at least the drafting of paragraphs in the petition) could have been segregated. However, given that the appellee introduced his billing records, appellant should have parsed through them and found examples of discrete tasks unrelated to the one cause of action on which appellee prevailed. Controverting proof should be at least as detailed as the application’s proof. If the plaintiff offered individual time entries, the controverting party should attack with specific examples, which will then lend support to a broader attack such as *Serralde’s* mathematical formula. *See* discussion of *Ruder v. Jordan*, No. 05-16-00742-CV, 2018 Tex. App. LEXIS 970 (Tex. App.—Dallas Feb. 2, 2018, no pet.) (mem. op.) immediately below for an example of a successful entry by entry attack.

### 3. **Controverted Attorneys’ Fees Upheld If In Range Of Evidence**

While the jury cannot award zero attorneys’ fees if some evidence is proffered, it is not bound to award the number sought by claimant if those fees have been controverted by the debtor/defendant by “put[ting] on evidence that contradicts the fees sought by the [claimant]—whether by cross examination of the [claimant’s] expert or by presenting its own expert . . . .” *In re BCH Dev., LLC,*

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65 If you wish to use an overarching analysis and need to distinguish *Serralde*, there are a number of procedural issues that prevented the San Antonio Court of Appeals from fully engaging the substance of some of Serralde’s arguments. In addition to the TRAP 38.1(i) issue, the appellant provided a partial record, which always poses some risk, and further failed to file a statement of his appellate points or issues. *Serralde*, 2018 Tex. App. LEXIS 1344 at *4-5. Under these circumstances, the court was “required to presume the omitted portions of the record are relevant and support the trial court's judgment.” *Id.* at *5.
Finding that the jury’s awarded amount was well within the broad range between BCH’s attorneys’ fees expert’s testimony and the Association’s attorneys’ fees expert’s testimony, the Dallas Court of Appeals held that the award was supported by the evidence. Id. at 929-930 (citing Garden Ridge, L.P. v. Clear Lake Ctr., L.P., 504 S.W.3d 428, 445 (Tex. App.—Houston [14th Dist.] 2016, no pet.); and Ropa Exploration Corp. v. Barash Energy, Ltd., No. 02-11-00258-CV, 2013 Tex. App. LEXIS 7290, at *12 (Tex. App.—Fort Worth June 13, 2013, pet. denied) (mem. op.) (affirming jury’s award of attorneys’ fees despite the lack of documentary evidence supporting the award when the award was within the range of evidence presented at trial). See also, e.g., Southwestern Energy Prod. Co. v. Berry-Helfand, 491 S.W.3d 699, 713 (Tex. 2016) (“The jury generally has discretion to award damages within the range of evidence presented at trial.”).

Likewise, a trial court has broad discretion to award fees within the range of evidence presented. In Ruder v. Jordan, No. 05-16-00742-CV, 2018 Tex. App. LEXIS 970 (Tex. App.—Dallas Feb. 2, 2018, no pet.), the trial court awarded Ruder attorneys’ fees under the Texas Citizens Participation Act after dismissing Jordan’s defamation claim. Ruder submitted her attorney’s affidavit on fees requesting $30,380.00 in attorneys’ fees and $5,464.70 in costs. Id. at *5-6. Jordan’s counsel filed a very detailed controverting affidavit extensively auditing and, thereby, effectively challenging Ruder’s fee request. Id. at *8-11. The trial court awarded $9,000 for attorneys’ fees and $600 for costs. Id. at *6-7. The Dallas Court of Appeals noted that whether attorneys’ fees are reasonable and necessary is a fact question and the trial court’s decision is reviewed on an abuse of discretion standard with no abuse occurring where the court bases its decision on conflicting evidence. Id. at *7-8. Finding no abuse in this case where the award was within the range of fees presented by the conflicting evidence, the Dallas Court explained:

The fact finder can consider the nature and complexity of the case, the amount in controversy, the amount of time and effort required, and the expertise of counsel in arriving at a reasonable amount of attorney’s fees. See, e.g., Murrco Agency, Inc. v. Ryan, 800 S.W.2d 600, 607 (Tex. App.—Dallas 1990, no writ) (factors to be considered include nature of the case, time spent, and skill and experience required). The amount and reasonableness of attorney’s fees also involves several intangible factors, and the trial court can draw on its own expertise in that decision-making. See id. at 606-07.

Id. at *8 (noting that Ruder, as the seeking party, had the burden of proof and, while Ruder’s proof was competent, it was not conclusive). See also Pitts v. Dallas County Bail Bond Bd., 23 S.W.3d 407, 415 (Tex. App.—Amarillo 2000, pet. denied) (affirming trial court’s award of attorneys’ fees because the amount was within the range supported by the evidence).

(a) PRACTICE POINTER: Controverting Affidavit Example

A copy of Jordan’s Response and supporting affidavit is attached as Appendix D. This provides a good example of how to controvert your opponent’s fee application. Thanks to Kimberly Lafferty of the Lafferty Law Firm for providing a copy.
4. Cross-Examination May Constitute Sufficient Controversion

(a) Trial Fees

Often, debtors/defendants rely exclusively on cross-examination to challenge attorneys’ fees. This can be a risky proposition for a number of reasons. *Cullins v. Foster* offers some support for the proposition that cross examination can preclude an award of attorneys’ fees as a matter of law when the opposing party provides no controverting testimony or evidence. See 171 S.W.3d 521, 537 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). However, the facts and procedural history in *Cullins* make it difficult to apply. In that case, Foster’s expert testified to trial fees of $47,000 and sought appellate fees of $24,000. The jury awarded $5,000 trial fees and no appellate fees. On JNOV, the trial court awarded $15,000 through trial and $10,000 in appellate fees. Id. at 528, 535. Additionally, this was a real property dispute and fees were sought under Texas Civil Practice & Remedies Code section 16.034(a), which permits fees at the trial court’s discretion. Id. at 536. Foster appealed and sought rendition of his attorneys’ fees in the amount to which his expert testified, as they had been proved as a matter of law under *Ragsdale* or, in the alternative, remand as the jury’s award on fees was against the weight of the evidence. With this background, the Houston Fourteenth Court of Appeals found that the Foster’s attorneys’ fees expert had been contested and discredited through cross-examination where he made numerous adverse admissions on the segregation and litigation value elements. Id. at 538. The court, quoting *Ragsdale*, noted that:

“We do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed.” The court explained, “For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only raise a fact issue to be determined by the trier of fact.”

Id. (internal citations omitted). The Fourteenth Court of Appeals concluded that, under the facts, the Fosters could not claim that they should recover their fees as submitted, as their expert’s testimony did not rise to the level permitting an award of the amount of attorneys’ fees as a matter of law under *Ragsdale*. Id. at 538-39. However, the court then turned to the factual insufficiency question and sided with Foster, noting that the Cullinses had failed to elicit testimony or evidence on the reasonableness of the hourly rate. Id. at 539-40. See also *Wagner v. Edlund*, 229 S.W.3d 870, 875-77 (Tex. App.—Dallas 2007, pet. denied) (in which the Dallas Court of Appeals cited *Ragsdale* and *Cullins* and found that Wagner had not proven his attorneys’ fees as a matter of law where rendition was sought, in part, based on the Edlunds’ cross-examination resulting in Wagner’s counsel admitting he had not segregated fees).

(b) Appellate Fees Require Separate Cross-Examination

Cross-examination on trial-court fees does not controvert or cast doubt upon otherwise undisputed evidence about appellate fees. *Cumberland Casualty & Surety Co. v. Nkwazi, L.L.C.*, No. 03-02-00270-CV, 2003 Tex. App. LEXIS 4902, *17 (Tex. App.—Austin June 12, 2003, no pet.) (mem. op.) (“Cumberland did extensively cross-examine Shaffer regarding attorney’s fees accrued by Nkwazi related to the pretrial events and up to the trial itself. However, Cumberland did not cross-

M. Recovering for Preparing Fee Application or Affidavit

Generally, the requesting party can recover for the time taken to prepare and present its attorneys’ fees claim, whether that be a trial or through a post-trial fee application. See Cty. of Dimmit v. Helmerich & Payne Int’l Drilling Co., No. SA-16-CV-01049-RCL, 2018 U.S. Dist. LEXIS 32631, at *12 (W.D. Tex. 2018).66

N. Supplementing Fee Application or Affidavit

Often one’s fee application or affidavit is written weeks or months before the judgment is entered. In the interim, considerable amounts of work are done that do not appear on the contemporaneous billing records submitted with the fee application or affidavit.67 In your application or affidavit, you should attempt to project this time, much like you would project appellate fees. Alternatively, consider supplementing your fee application or affidavit. See Serralde v. Flores, No. 04-17-00078-CV, 2018 Tex. App. LEXIS 1344 at *10-11 (Tex. App.—San Antonio Feb. 21, 2018, no pet.) (while not technically a holding of the court, it noted that the appellee supplemented his fee affidavit at a post-trial hearing and recognized that the supplemental testimony supported an additional 10% in fees). To be safe, you should note in your fee application or affidavit that you reserve the right to supplement with fees incurred after the application or affidavit is submitted.

However, it may be error to supplement fee applications on remand. See Sullivan v. Abraham, No. 07-17-00125-CV, 2018 Tex. App. LEXIS 1196 at *7-12 (Tex. App.—Amarillo Feb. 13, 2018, no pet.). In Sullivan, the case had previously been appealed to the Texas Supreme Court, which remanded the case to the trial court for further proceedings on the attorneys’ fees issues. Once back

66 Under Federal Rule of Civil Procedure 54(d), “[a] claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.” Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 U.S. Dist. LEXIS 211061, at *9 (E.D. Tex. 2017) In Tech Pharmacy (a case in which fees were sought under the contract, not statute), the court concluded that attorneys’ fees were not an element of damages as the contract provided that “attorneys’ fees ‘shall be in addition to any other relief that may be awarded,’ and additionally contemplated that the award may be sought ‘in a separate action.’” Id. at *11. As such, the attorneys’ fees were costs of collection or costs incurred to enforce or interpret the contract, not compensation for the underlying harm. Id. Accordingly, the attorneys’ fees claim was properly submitted by motion post-trial pursuant to Rule 54(d). Id. at *12.

67 This issue is a personal pet peeve of one of the authors as, after testifying as to his fees at a simple breach of contract bench trial, the trial court required significant post-trial briefing, which almost doubled the cost of the two day trial. Needless to say, this briefing was not included in his fees testimony as the briefing was not requested until after the close of evidence, and he did not recover them. He should have requested the evidence be re-opened and supplemented his fee application.
in the trial court, Sullivan’s counsel filed several supplemental fee affidavits detailing work performed on appeal (and greatly exceeding the original appellate fees estimate given at the original hearing as Abraham argued in his brief that Sullivan presented no evidence of appellate fees in the original hearing). In turn, Abraham demanded a jury trial on the fees issues on remand, but withdrew the request in exchange for the right to file controverting affidavits. On the second appeal, Abraham complained that the court erred in considering new evidence of fees on remand arguing that the trial court’s determination of fees should be limited to record developed in the initial hearing.68 The Amarillo Court of Appeals did not directly address this issue finding that, if there was error, both parties invited it.

O. Default Judgment Attorneys’ Fees Award Requires Proper Proof as Are Unliquidated Damages

“The reasonableness of attorney’s fees, in the absence of a contract therefore, is a question of fact and is an unliquidated demand for which the trial court entering a default judgment should hear evidence.” See Rouhana v. Ramirez, 556 S.W.3d 472, 478 (Tex. App.—El Paso 2018, no pet.) (reversing the attorneys’ fees award for lack of proof in a post-answer default judgment case). Given that attorneys’ fees are in the nature of unliquidated damages, proper proof (affidavit discussing Arthur Andersen factors, segregating fees as needed, and attaching contemporaneous time sheets should be required in both no-answer and post-answer defaults.

P. Appellate Fees: Detailed Analysis Should Be Provided or Required

We have found no cases in which the award of appellate attorneys’ fees is reversed for a failure to provide a detailed analysis of the projected fee. However, merely asserting a number on appeal should draw an objection as conclusory and lacking foundation, like any other expert witness opinion. While courts tend to give attorneys’ great leeway in testifying on attorneys’ fees, particularly attorneys’ fees in their own cases, there has to be a boundary somewhere. The claimant should have to make a reasonable estimate based on something like projected hours of work or prior appeals of similar sized or complex cases. The debtor/defendant should cross-examine the claimant’s attorneys’ fees expert on the assumptions for how he reached a number based on whatever methodology he chooses.69 For many of our clients, we are required to prepare budgets. In discovery, ask if the opposing counsel had to prepare a budget for this case or other cases. Make the expert go through the process for the appellate work. Make him explain how much of the research has already been done and how that will affect the cost of briefing. Have him detail what work must be done on an appeal and how much time it will take. Have him compare and contrast the fees needed through trial with appeal.

However, if you do not object, vigorously cross-examine, and provide controverting evidence, you likely will not be able to reverse an award. See Morales v. Carlin, No. 03-18-00376-CV, 2019

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68 See Appellee’s Brief at 10-12, which may be found at txcourts.gov. Therein, Abraham asserted, in part: “The trial court must rely on the evidence provided in the initial trial of the case to determine the amount of attorney’s fees to award. Interstate 35/Chisam Rd., L.P. v. Moayed, 05-16-00196-CV, 2017 WL 1046768, at *4 (Tex. App.—Dallas Mar. 20, 2017, no pet.). This limit on fee evidence applies to prohibit evidence on remand of “actual” appellate fees incurred as well as fees for work performed after the mandate issued. Id.”

69 Perhaps a Daubert/Robinson challenge?
On appeal, the appellant complained “that the award of appellate attorneys’ fees was improper because it was based on ‘estimates of counsel’ and that there was ‘no testimony with regard to the estimated number of hours an appeal would require, the rate at which the tasks of appeal would require, and ultimately whom would perform the work on appeal.’” *Id.* The court of appeals dismissed this complaint in large part because the appellant had not offered any controverting testimony. *Id.* While not expressly stated in the opinion, an estimate, if otherwise reasonable, should be an acceptable opinion. *See also* Pac. Energy & Mining Co. v. Fid. Expl. & Prod. Co., No. 01-17-00594-CV, 2018 Tex. App. LEXIS 5586, at *29-31 and 33-35 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet.) (mem. op.) (finding appellant waived any objection to insufficient evidence of appellate fees by not submitting a controverting affidavit, which was required to create a fact issue in response to the motion for summary judgment).

Q. A List of Possible Objections to Attorneys’ Fee Evidence

The following is a consolidated list of possible objections that were raised in the cases in this paper as well as a handful lifted from Steven Hayes, What Do You Have To Lose? Perhaps Your Appeal, If You Don’t Use Error Preservation To Sell Your Case At Trial, (TADC 2016). This is by no means a complete list. If you see others, please send them to the authors for addition to the next paper.


2. Object that recovery of attorneys’ fees violates the American Rule as no contract or statute provided for recovery under the facts and circumstances of the claimant’s case or the causes of action plead.

3. Object to claimant’s failure to comply with the specific provisions and terms of the applicable attorneys’ fees statute or contractual provision. *See generally Enzo Invs., LP v. White*, 468 S.W.3d 635, 651 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).


6. Object to plaintiff’s pleading all conditions precedent have been satisfied (by making a specific denial to satisfy Rule 54) and again at trial (in order to avoid trial by consent) if you contest that the claimant presented its claim.

8. Object to failure to adequately present minimum evidence of *Arthur Andersen* factors (i.e., evidence of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required) in traditional method cases. *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012).


10. Object to plaintiff seeking recovery based on a contingency fee without supporting the contingency fee by either *Arthur Andersen* factors or lodestar. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

11. Object to the failure to segregate fees (at every level, through trial, appellate, petition for review, and merits briefs in the Texas Supreme Court) or, if an effort has been made to segregate fees but based on the intertwined fact or causes of action, then object to a failure to segregate the fees based on discrete legal services. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). Make the objection specific like the example in *Permian Power Tong, Inc. v. Diamondback E&P, LLC*, 550 S.W.3d 642, 665-66 (Tex. App.—Tyler 2017, pet. denied).

12. Object to the format of the proof of attorneys’ fees (lack of contemporaneous time records or, within those time records, redacting, block billing, reflect clerical work, limited or vague entries, etc.); however the format objection needs to be tied to (1) creating an inability to cross-examine the claimant’s attorneys’ fees expert (for instance on segregation or duplicative work), (2) evaluate the attorneys’ fees (duplicative, excessive, or inadequately documented under *Arthur Andersen* or lodestar), (3) make the proffer conclusory as based, or (4) lay an inadequate foundation for an expert’s testimony. See generally *In the Estate of Johnston*, No. 04-11-00467-CV, 2012 Tex. App. LEXIS 4255, at *5 (Tex. App.—San Antonio May 30, 2012, no pet.) (mem. op.); *Kartsotis v. Bloch*, 503 S.W.3d 506, 520 (Tex. App.—Dallas 2016, pet. denied); and *Permian Power Tong, Inc. v. Diamondback E&P, LLC*, 550 S.W.3d 642, 664 (Tex. App.—Tyler 2017, pet. denied). And, then produce specific examples.


14. Object to claimant’s attorneys’ fees expert’s affidavit with any standard objections made to affidavits submitted for summary judgment, lack of personal knowledge, lack of
foundation, conclusory statements, etc. Additionally, object to claimant’s failure to serve a copy of an attorneys’ fees affidavit under TCPR Sec. 18.001(d). *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App. – El Paso 2014, no pet.).

15. Object to claimant’s attorneys’ fees expert’s testimony with any standard objection to expert testimony, including that testimony is conclusory as it is not more than bald assertions lacking adequate supporting facts (particularly necessary for testimony on appellate fees where claimants often merely assert a number for each level). Additionally, object to the method for calculating fees. *Dias v. Dias*, No. 12-12-00685, 2014 Tex. App. LEXIS 12676, 30-31 (Tex. App. – Corpus Christi Nov. 25, 2014, pet. denied) (mem. op.).

16. Object to the judge, not the jury, making the finding about reasonable and necessary attorneys’ fees. *Jefferson County v. Ha Penny Nguyen*, No. 09-13-00505-CV, 2015 Tex. App. LEXIS 8052, *74-75 (Tex. App. – Beaumont July 31, 2015, no pet.) (mem. op.) However, recall that the court determines as a matter of law whether attorneys’ fees are recoverable, whether lodestar has been elected, and whether fees must be segregated, all of which are questions of law.

17. Object to disclosure of the attorneys’ fees expert under 194.2(f) as inadequate or untimely (including production of the report and documents). See generally *Carter v. Flowers*, No. 02-10-00226-CV, 2011 Tex. App. LEXIS 7829, at *16-18 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.) (note, however, that this is in the sound discretion of the court and frequently denied, particularly where the court offers a cure, such as a continuance, additional time, or a deposition, and such offer is refused).


R. Motions for Summary Judgment vs. Motions to Award Attorneys’ Fees

As no-evidence motions for summary judgment are not permitted for causes of action on which you have the burden of proof, only traditional motions for summary judgment can be used to recover attorneys’ fees; however the evidentiary standard is daunting and any controverting fact or even an objection to such things as a failure to segregate fees could raise a fact issue resulting in a proper denial of an award of fees. See *Cook v. Izen*, No. 09-17-00025-CV, 2019 Tex. App. LEXIS 663, at *16-19 (Tex. App.—Beaumont Jan. 31, 2019, no pet.) (mem. op.) and Texas Rule of Civil Procedure 166a. In that promissory note case, the appellate court upheld the trial court’s granting the plaintiffs’ motion for summary judgment on liability, but denying the plaintiffs’ motion with respect to requesting fees finding a fact issue on reasonableness and a failure to segregate. Under these circumstances, plaintiffs should have either moved for an award of fees or, if a jury fee has been paid and the defendants objected to the bench determining fees, sought a trial
on fees, both of which have a preponderance of the evidence standard. After granting the summary judgment in liability, the defendant cannot appeal as it is interlocutory and the appellate court will not have jurisdiction. So, a motion to award fees, bench trial, or jury trial limited to fees is still timely. Conversely, the plaintiffs should not request that the court “finalize the judgment” as that will waive their right to recover fees. *Id.* at *19.*

In a case in which the trial court granted the plaintiff’s traditional motion for summary judgment and awarded all of the fees plaintiff requested, the Houston First Court of Appeals reversed holding that the plaintiff had not conclusively proved his attorneys’ fees. See *Cossio v. Delgado*, No. 01-17-00704-CV, 2018 Tex. App. LEXIS 4828, at *5-11 (Tex. App.—Houston [1st Dist.] June 28, 2018, no pet.) (mem. op.). In *Cossio*, the plaintiff’s attorneys’ fees expert submitted an affidavit as motion for summary judgment evidence of attorneys’ fees. *Id.* at *3-4. The affidavit is fairly cursory stating the total number of hours worked and hourly rate and list, without any discussion or application to the case, the *Arthur Andersen* factors. *Id.* The affidavit does not describe the work performed and did not attach contemporaneous billing records. *Id.* The court found that the plaintiff had elected the lodestar method by referencing his hourly rate, total hours worked, and total fee incurred. *Id.* at *7-8.* However, the court noted that the “the affidavit does not list the types of tasks that he performed or the time he spent on any specific tasks,” which are part of the minimum requirements for proving fees under the lodestar method. *Id.* at *8-10. The affidavit also failed to say that the stated appellate fees would be “reasonable” and failed on that count. *Id.* at *10.

Compare the above with the following cases. In *Lion Co-Polymers Holdings, LLC v. Lion Polymers, LLC*, the court sets forth the procedural history by which the defendant prevailed on a motion for summary judgment, which included a prayer for attorneys’ fees, but did not attempt to submit the fees at the time. No. 01-16-00848-CV, 2018 Tex. App. LEXIS 4835, at *40-43 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. filed) (mem. op.). Thereafter, it filed a motion for entry of judgment in which it submitted its fees by way of an affidavit, which attached the contemporaneous billing records. *Id.* at *40-41. The trial court awarded all of the fees requested, which the appellate court upheld with a modification to correct the trial court’s order on the amount actually requested. *Id.* The appellate court does not address the possible difference in the burden of proof between a motion for summary judgment and a motion for entry of judgment, but, under its analysis, it did not need to do so as it found the uncontroverted fees establish as a matter of law. The court did (1) reject the appellant’s argument that the prevailing party waived its right to recover fees by failing to address the amount of attorneys’ fees in or attaching its contemporaneous billing records to the motion for summary judgment and (2) found that by merely praying for attorneys’ fees in the motion for summary judgment the appellee had preserved the issue for consideration in the motion for entry of judgment. *Id.* at *38-43.

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70 As the plaintiffs in this case requested that the court make the summary judgment final, “under the invited-error doctrine, we cannot overturn a judgment that resulted from the trial court’s agreement to comply with a request made by the party who is complaining about the ruling on appeal.” *Id.*

71 The affidavit is quoted almost in its entirety. *Id.* at *3-4.

72 See V. Proving Attorneys’ Fees, D. Electing the Lodestar Method, 1. Lodestar Presumptively Produces a Reasonable Fee, (a) Practice Pointer: Beware Electing Lodestar without Knowing It, *supra* at p. 47.
In Morales v. Carlin, the prevailing defendant did not submit his attorneys’ fees in his successful motion for summary judgment; rather, after receiving the summary judgment, he filed a motion for entry of fees. No. 03-18-00376-CV, 2019 Tex. App. LEXIS 2398, at *16 (Tex. App.—Austin Mar. 28, 2019, no pet. h.) (mem. op.). The losing party complained on appeal that the prevailing defendant had not “conclusively established” his fees as required by the summary judgment standard; however, the court of appeals rejected this argument pointing out that the fee request was not part of the summary judgment. Id. at 20-22. While not expressly stated in the opinion, this case provides support for the proposition that post-summary judgment motions to award fees are decided on a mere preponderance of evidence standard with the judge sitting as the factfinder.

As these cases reflect, if you pursue attorneys’ fees in a motion for summary judgment, you must be certain to check all of the boxes and meet all of the criteria and, even then, the non-movant can raise fact issues and objections that can derail the award. However, if you pray for fees in your motion for summary judgment and wait to seek the fees in the post-summary judgment motion, the burden appears to be much less.

VI. Certain Causes of Action

These are simply the causes of action that we recently encountered in researching and writing this paper. They have no other significance than that. However, they prove the point that you have to do your research to determine whether your cause of action is one for which recovery is permitted or if there is some odd little quirk about it.

A. Recovering Attorneys’ Fees Expended on Erroneous Arbitration

The Houston First Court of Appeals addressed the prevailing party’s ability to recover attorneys’ fees expended during an arbitration sought by its opponent and, reasoning that almost all arbitrations arise from a contract, held that, “if an order compelling arbitration is found to have been error, the attorneys’ fees spent on the arbitration are generally recoverable because arbitration generally involves prosecuting contract claims ….” In re Vantage Drilling Int’l, 555 S.W.3d 629, 633 (Tex. App.—Houston [1st Dist.] June 5, 2018, pet. filed) (orig. proceeding)73 In that case, the plaintiff filed suit and the parties litigated in the district court for 11 months before the plaintiff moved to compel arbitration, which the trial court granted. The defendant filed a writ of mandamus arguing, among other things, that waiting until a final judgment on the arbitration could rob it of the ability to get its attorneys’ fees incurred during the intervening arbitration. In denying the mandamus, the Houston First Court of Appeals concluded, in part, that the defendant’s fees for arbitrating would be recoverable if it was ultimately the prevailing party and, as such, it had an adequate remedy on appeal.

B. Breach of Implied Warranty: Look to the Damages Sought

In Howard Industries Inc. v. Crown Cork & Seal Company LLC, the Houston First Court of Appeals recognized the claimant’s right to recover attorneys’ fees for breach of implied warranty,

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73 On November 16, 2018, the Texas Supreme Court, without granting the petition, requested briefs on the merits and the Petitioner’s Reply Brief was filed on March 11, 2019.
which was the only cause of action to survive directed verdict at trial. Howard Industries appealed
and argued that the trial court erred in awarding attorneys’ fees to Crown Cork on its breach of the
implied warranty of merchantability claim. See 403 S.W.3d 347 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Although UCC Chapter Two, which governs the sale of goods, does not authorize
attorneys’ fees for breach of an implied warranty of merchantability, Texas Civil Practice and
Remedies Code section 38.001(8) permits an award of attorneys’ fees for a suit based on a written
or an oral contract. The First Court of Appeals began by noting that the Texas Supreme Court had
recently recognized that section 38.001(8) permitted recovery of attorneys’ fees in an express
warranty claim even where UCC Chapter Two was silent on such recovery. See Medical City
Dallas, Ltd. v. Carlisle Corporation, 251 S.W.3d 55 (Tex. 2008). Medical City recognized breach
of warranty claims to be a creature of contract, especially where economic loss damages are
sought. As pleaded and tried to the jury in this case, the Crown Cork’s breach of implied warranty
of merchantability claim is such a claim, despite the fact that (1) there was no written or oral
contract between Howard Industries and Crown Cork and (2) Howard Industries received a
directed verdict on the actual breach of contract claim (not merely a breach of warranty claim that
“sounded in contract”). The First Court of Appeals noted that breach of implied warranty claims
could be either tort or contract and the determination is often made by looking at the damages
sought. Finally, the court rejected the rulings or statements to the contrary made in 7979 Airport
Garage L.L.C. v. Dollar Rent A Car Sys., 245 S.W.3d 488, 509 n. 31 (Tex. App.—Houston [14th
Dist.] 2007, pet. denied) which acknowledges, without much discussion or analysis, that “recovery
of attorney’s fees for a common law breach of implied warranty claim is not authorized by statute.”

In Lopez v. Huron, the evidence showed Huron made and sold masa, which he packaged in plastic
bags purchased from Lopez who, in turn, ordered the plastic bags from A.J. Plastics. See 490
S.W.3d 517 (Tex. App.—San Antonio 2016, no pet.). Due to a defect in the plastic, the bags’
seams were splitting and the masa inside spoiling. Huron sued Lopez and AJ Plastics for breach
of implied warranty based in contract. After considering “contract v. tort and the economic loss
rule” and “defective product v. ‘other property,’” the San Antonio Court of Appeals found that as
the damage was to the product itself (the bag being a component of the finished product) and that
there was no damage to other property, this was a contract claim, not a products liability claim. As
such, it sounded in contract and permitted a Chapter 38 attorneys’ fees claim.

C. Texas Theft Liability Act § 134.005(b) Awards Fees to “Person Who Prevails”

The Texas Theft Liability Act (“TTLA”) provides for attorneys’ fees to the “person who prevails”
under § 134.005(b) of the Texas Civil Practice & Remedies Code. See Brinson Benefits, Inc. v.
Hooper, 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.) and Agar Corp. v. Electro Circuits
Intl’, No. 17-0630, 2019 Tex. LEXIS 351, at *24-25 (Tex. Apr. 5, 2019). In Agar, the losing
Plaintiff argued to the Texas Supreme Court that (1) “person who prevails” applies only to
plaintiffs, (2) defendant did not “prevail on the merits” as it won on a statute of limitations
argument, and (3) defendant’s fees should have reduced as the defendant waited to long to file its
successful traditional motion for summary judgment. Agar Corp., 2019 Tex. LEXIS 351, at *25-27. The Texas Supreme Court rejected all three arguments holding that (1) “person who prevails”
applies equally to plaintiffs and defendants, (2) “a defendant ‘prevails’ when the plaintiff loses
with prejudice, whether on the merits or for some other reason,” and (3) where defendant won on
a traditional motion for summary judgment on one claim and a no-evidence motion for summary
judgment on another and plaintiff’s counter-affidavit contesting only that fees should be reduced because the traditional motion for summary judgment should have been filed earlier (but does not address the no-evidence motion for summary judgment and fact that it can only be filed after adequate time for discovery), the affidavit’s underlying rationale fails and offers no other support for its assertion that defendant’s fees were not reasonably necessary. Id. Arguably, this leaves open the timing issue should the defendant prevail only on a traditional motion for summary judgment for a ground, such as statute of limitations, that could have been filed early in the case.

D. Conspiracy: Look to the Underlying Tort

In *Brinson Benefits, Inc. v. Hooper*, the appellees, Sendelbach and HMA, argued that underlying tort was based on theft under the Texas Theft Liability Act ("TTLA"), which provides for attorneys’ fees for the prevailing party. 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.). The appellant, Brinson, argued that it had not sued them under the TTALA, but for a series of common law torts. The appellees pointed out that one of those torts was conspiracy to commit theft. The Dallas Court of Appeals ruled that civil conspiracy is a derivative tort and, if the underlying tort does not entitle a party to attorneys’ fees, that party may not recover its attorneys’ fees for conspiracy to commit that tort. However, here the underlying tort invoked the TTALA. Therefore, to succeed, Brinson would have had to prove that Sendelbach and HMA were liable for the underlying theft. He failed to do so, making HMA and Sendelbach the prevailing parties and entitling them to attorneys’ fees under the TTALA.

E. Fiduciary Duty “Subsuming” Breach of Contract Does Not Allow Attorneys’ Fees

In *Bruce v. Cauthen*, Bruce and Cauthen were business partners in two businesses. 515 S.W.3d 495, 514 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Cauthen left one of the two resulting in disagreements regarding both businesses. Cauthen sued for breach of contract and breach of fiduciary duty. After a series of favorable rulings on summary judgment, directed verdict, and eventually jury findings at trial, Cauthen recovered actual damages on both claims, attorneys’ fees on the breach of contract claim, and exemplary damages on the breach of fiduciary duty claim. Cauthen elected to recover on her breach of fiduciary duty claim. The Houston Fourteenth Court of Appeals began its attorneys’ fees analysis by recognizing that attorneys’ fees incurred by a party to litigation are not recoverable against his adversary in an action in tort, and breach of fiduciary duty is a tort claim for which attorneys’ fees generally may not be recovered. Although she recovered on both her breach of contract and her breach of fiduciary duty claims, Cauthen elected to recover under breach of fiduciary duty in order to collect the exemplary damages award. As a result and relying upon *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 309-14 (Tex. 2006) and *MBM Financial Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666-67 (Tex. 2009), the court of appeals rejected her argument that when the breach of fiduciary duty “subsumes a breach of contract and vice versa,” and when the plaintiff receives jury findings on both theories, Texas courts have permitted recovery of exemplary damages and attorneys’ fees in addition to actual damages. See also *Robbins v. Robbins*, 550 S.W.3d 846, 855 (Tex. App.—Fort Worth 2018, no pet.) (bluntly stating: “Attorney’s fees are not available for a breach-of-fiduciary-duty claim.”)
F. Interpleader: If Interpleader Seeks Portion of Funds, No Attorneys’ Fees

In *Finserv Casualty Corp. v. Transamerica Life Insurance Co.*, the FinServ plaintiffs (“Finserv”) claimed that the Transamerica defendants (“Transamerica”) failed to make structured settlement payments and brought suit on numerous causes of action. *See* 523 S.W.3d 129, 142 (Tex. App.— Houston [14th Dist.] 2016, pet. denied). In turn, Transamerica pleaded offset, interpleader, and sought attorneys’ fees related to the interpleader and declaratory judgment. The trial court granted various summary judgments disposing of all claims, other than the defendants’ request for attorneys’ fees, which were submitted to and awarded by the jury. The trial court rendered a final judgment dismissing the plaintiffs’ claims, granting the defendants summary judgment on their right to interpleader and to an offset, and awarding the defendants $25,000 as reasonable and necessary attorneys’ fees for prosecuting the interpleader action. It also awarded attorneys’ fees for the declaratory-judgment claims, but we do not deal with those here. While the Fourteenth Court of Appeals affirmed that a disinterested stakeholder who has reasonable doubts as to the party entitled to the funds in its possession and who in good faith interpleads the funds may recover its reasonable attorneys’ fees, it found that Transamerica were not disinterested as they applied for and obtained an offset of over two-thirds of the amount interpled. Put simply: “Under the unambiguous meaning of the term ‘disinterested stakeholder,’ a party who asserts a claim to the interpled funds is not a disinterested stakeholder.” *Id.* at 141.

Similarly, the Texas Supreme Court reiterated that interpleader requires an unconditional tender by an innocent, disinterested stakeholder. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex 2018).74 However, the Texas Supreme Court found that the Fort Worth Transit Authority defendants failed to make an unconditional tender as they conditioned the interpleader on the court accepting that their cumulative liability was capped at $100,000, which the court described as nothing more than a settlement offer. *Id.* at 851. Additionally, the Texas Supreme Court found that the Fort Worth Transit Authority defendants were not disinterested stakeholders as they asserted that “the claims against them were defensible and that they would put up a defense if their interpleader terms were not accepted necessarily defeats their proposed status as a disinterested stakeholder.” *Id.* at 852. Ultimately, the Texas Supreme Court explained we find no precedent to support extending the protection of interpleader—and the accompanying attorney's fees—to an alleged tortfeasor/defendant. Moreover, the allowance of attorney's fees for an alleged tortfeasor/defendant attempting to interplead the extent of his liability is adverse to public policy. … Interpleader is not a vehicle to allow an interested party—an alleged tortfeasor/defendant—to escape the burdens of litigation. We therefore affirm the part of the court of appeals' judgment that the Transit Defendants are not entitled to attorney's fees, but on different grounds.

*Id.* at 852.

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74 Fascinatingly, the petitioner preserved error on the attorneys’ fees issue by briefly mentioning it in the prayer in its petition for review. *Fort Worth Transp. Auth.*, 547 S.W.3d at 849.
G. Statutory Fraud


H. Property Code § 5.006(a) Only Successful Claimant Recovers Fees and Costs

Like Chapter 38, only the claimant is entitled to fees and cost under Property Code §5.006(a) involving causes of action for breach of a restrictive covenant related to real property; a party successfully defending such a claim cannot recover either. See Garden Oaks Maint. Org. v. Chang, 542 S.W.3d 117, 140 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

I. Property Code § 53.146 for Foreclosing on Lien


J. Property Code § 21.0195 for TxDOT Dismissal of Condemnation Case

This section only applies to cases in which either (a) the Texas Department of Transportation dismisses a condemnation proceeding it has brought or (b) the court dismisses it for the department’s failure to bring the proceeding properly. In either case, “the court shall make an allowance to the property owner for … any expenses the property owner has incurred in connection with the condemnation, including reasonable and necessary fees for attorneys.” TEX. PROP. CODE ANN. § 21.0195(c). After reviewing cases applying this section (one of which noted that failing to award the property owner fees would frustrate the express language of the statute), the San Antonio Court of Appeals liberally construed the statute for the benefit of the property owner and upheld the trial court’s award of fees to the property owner. See State v. CPS Energy, No. 04-18-00063-CV, 2018 Tex. App. LEXIS 5407, at *1 (Tex. App.—San Antonio July 18, 2018, pet. filed) (mem. op.). Note that the language (1) appears mandatory and (2) uses “incurred”.75

75 For a discussion of limitations on awards under statutes using the term “incurred” see MacFarland v. Le-Vel Brands LLC, No. 05-17-00968-CV, 2018 Tex. App. LEXIS 3386, at *6-17 (App.—Dallas May 15, 2018, no pet.) (mem. op.) (refusing to award contingency fee in Texas Citizens Participation Act under Tex. Civ. Prac. & Rem. Code Ann § 27.009(a)(1) as the fees were not “incurred” in defending the case).
K. Property Code § 114.064 Trustees’ Attorneys’ Fees

In trust disputes involving trustees, courts are authorized to award “reasonable and necessary attorneys’ fees as may seem equitable and just.” TEX. PROP. CODE ANN. § 114.064. The Tyler Court of Appeals considered the trial court’s fees award to the prevailing trustee under this provision as well as the Texas Declaratory Judgment Act, which also has an equitable and just standard. See: Goughnour v. Patterson, No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665, at *43-52 (Tex. App.—Tyler Mar. 5, 2019, no pet. h.) (mem. op.). The court noted that the determination depends on the concept of fairness in light of all the surrounding circumstances, addressed to the trial court’s discretion, and, therefore, reviewed on an abuse of discretion standard. Id. at *44-45. Conversely, the determination is not dependent on a finding that the party “substantially prevailed” or that the fees were reasonable and necessary. Id. In Goughnour, the Tyler Court of Appeals reversed the award noting that (1) the trustee was accused of self-dealing, (2) trustees are not entitled to recover expenses related to litigation resulting from their own fault, and (3) the trustee defeated the self-dealing claims on affirmative defenses (limitations), not the merits. Id. at 46-52. Given the trustee’s actions and lack of a finding clearing him of wrongdoing, the Tyler Court of Appeals ruled that awarding him fees was inequitable as a matter of law. Id. at *52. Although not dependent on it, another consideration under the equitable and just standard is whether the recovering party substantially prevailed. See In the Interests of K.K.W., No. 05-16-00795-CV, 2018 Tex. App. LEXIS 6539, at *39-42 (Tex. App.—Dallas Aug. 20, 2018, pet. filed) (mem. op.) (another case involving both § 114.064 and a declaratory judgment action). In this case, the appellant obtained reversal on only 1 of the 7 counts with the remainder affirmed including the central premise of the case. Id. at *41-42. Additionally, the Dallas Court of Appeals considered the fact that the trial court found that the appellant had forced the appellee to incur additional fees by “unnecessarily prolonging this suit,” and by having her expert provide ‘an exorbitant number of opinions,’ and repeatedly changing her theories of the case.” Id. at *41

L. Property Code § 92.109(a) Failure to Return Residential Tenant’s Security Deposit Timely

If a landlord fails to return a residential tenant’s security deposit in 30 days, Property Code § 92.109(a) provides that the tenant may recover from the landlord: (1) an amount equal to the sum of $100; (2) three times the portion of the security deposit wrongfully withheld; and (3) the tenant’s reasonable attorneys’ fees in a suit to recover the security deposit. See Swan v. Bienski Props., LP, No. 10-14-00309-CV, 2018 Tex. App. LEXIS 7665, at *15-16 (Tex. App.—Waco Sep. 19, 2018, no pet.) (mem. op.).

76 This case also features an odd combination of evidentiary and appellate point rulings, which may well have precluded the appellant from recovering her attorneys’ fees. Id. at *59-61. Appellant requested her attorneys’ fees; however, upon trustee’s relevance objection as the request was not supported by her pleadings, the trial court excluded the appellant’s evidence of attorneys’ fees. Id. at *59-60. The trial court then allowed an offer of proof; however, on appeal, the appellant did not raise a corresponding point complaining the exclusion of the attorneys’ fees the evidence as error and, thus, there was no “proof” in the record as offers of proof are not evidence. Id. at 60-61. Additionally, the Tyler Court of Appeals noted that the offer of proof did not establish the fees were reasonable and necessary and, therefore, the attorneys’ fees request also failed. Id. at 61.
M. Declaratory Judgment Act: A Few Words

This topic could well be the subject of its own paper. These comments barely scratch the surface. First, § 37.009 provides that the trial court may award costs and reasonable and necessary attorneys fees as are equitable and just. Garden Oaks Maint., 542 S.W.3d 117 at 141. The statute affords the trial court a measure of discretion in deciding whether to award attorneys’ fees. Id. “[I]n exercising its discretion in a declaratory-judgment action, a trial court may award attorney’s fees to the prevailing party, may decline to award attorney’s fees to either party, or may award attorney’s fees to the non-prevailing party, regardless of which party sought declaratory relief.” Id. (quoting Castille v. Serv. Datsun, Inc., No. 01-16-00082-CV, 2017 Tex. App. LEXIS 8491, at *11 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, no pet.)). In Garden Oaks Maint., the appellate court affirmed the trial court’s refusal to award fees to the prevailing party “under circumstances where the declaratory-judgment claims presented issues of apparent first impression requiring statutory interpretation and where one side committed a breach but the other side's behavior excused that breach.” Id. (citing Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C., 522 S.W.3d 471, 494-95, 497 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (trial court properly refused to award any section 37.009 attorneys’ fees where circumstances revealed both sides engaged in unjust and inequitable conduct). See also Guajardo v. Hitt, 562 S.W.3d 768, 781-783 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (applying Garden Oaks and other cases and questioning whether cross-appellants even prevailed and the amount of work needed on a declaratory judgment action issue where the record reflects very little time spent on the issue and the trial focused on the plaintiff’s breach of contract and breach of fiduciary duty claims). In other words, a trial court may not abuse its discretion in refusing to award fees on a declaratory judgment action that appears to be no more than a miniscule issue in the overall trial.

Parties often attempt to recast a cause of action for which fees cannot be recovered into a declaratory judgment action. Courts often reject such efforts. See Mellenbruch Family P'ship v. Kennemer, No. 04-17-00637-CV, 2018 Tex. App. LEXIS 6973, at *26-27 (Tex. App.—San Antonio Aug. 29, 2018, no pet.) (mem. op.) (explaining that “[W]hen “the trespass-to-try-title statute governs the parties’ substantive claims . . . [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney’s fees.””’ quoting Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 926 (Tex. 2013) (second, third alterations in original) (quoting Martin v. Amerman, 133 S.W.3d 262, 267 (Tex. 2004)). See also Tuttle v. Buiies, No. 11-17-00096-CV, 2019 Tex. App. LEXIS 2224, at *27 (Tex. App.—Eastland Mar. 21, 2019, no pet. h.) (“‘Attorney’s fees are not available in a suit to quiet title or to remove cloud on title.’ Id. at 957. A suit to quiet title, which is synonymous with a suit to remove a cloud from title, seeks to declare as invalid the defendant's claim of ownership or title.”)

Similarly, parties often try to recast breach of contract claims into declaratory judgment actions to recover attorneys. However, this is prohibited. In a breach of contract case in which the plaintiff could not recover attorneys’ fees from the limited liability corporation defendant under Chapter 38,77 the plaintiff asserted its declaratory judgment action as a grounds for attorneys’ fees; however the court rejected this finding that the breach-of-contract claim and declaratory-judgment claim

77 See Section III. Chapter 38, A. Statutory Language, 8. Attorneys’ Fees are Only Recoverable From Individuals and Corporations, Not Partnerships, Limited Partnerships, or Limited Liability Companies supra at p. 7.
were not independent claims. See TEC Olmos v. ConocoPhillips Co., 555 S.W.3d 176, 188-189 (Tex. App.—Houston [1st Dist.] May 31, 2018, pet. filed). Therein, the Houston First Court of Appeals declared:

“[W]hen a claim for declaratory relief is merely tacked onto a standard suit based on a matured breach of contract, allowing fees under [§ 37.009] would frustrate the limits Chapter 38 imposes on such fee recoveries.” MBM Fin. Corp. v. Woodlands Operating Co., 292 S.W.3d 660, 670 (Tex. 2009). “[A]n award of attorney's fees under [§ 37.009] is unavailable if the claim for declaratory relief is merely incidental to other claims for relief.” Jackson v. State Office of Admin. Hearings, 351 S.W.3d 290, 301 (Tex. 2011).

Id. at 188 (alterations in original). See also Anderton v. Green, 555 S.W.3d 361, 374 (Tex. App.—Dallas 2018, no pet.) (recognizing the general principle and quoting Hartford Casualty Insurance Co. v. Budget Rent-A-Car Systems, Inc., 796 S.W.2d 763, 772 (Tex. App.—Dallas 1990, writ denied) for the proposition that “[a] declaratory relief plea may not be coupled to a damage action simply in order to pave the way to recover attorney’s fees.”).

However, courts have noted an exception to the “tacked on” rule where the awarded party was merely responding to the opposing party’s declaratory judgment action. See Lion Co-Polymers Holdings, LLC v. Lion Polymers, LLC, No. 01-16-00848-CV, 2018 Tex. App. LEXIS 4835, at *36-37 (Tex. App.—Houston [1st Dist.] June 28, 2018, pet. filed) (mem. op.) (discussing MBM Fin. Corp and U.S. Fidelity & Guaranty Co. v. Coastal Refining and Marketing, Inc., 369 S.W.3d 559, 571-72 (Tex. App.—Houston [14th Dist.] 2012, no pet.)). In other words, where “[defendant] was eligible for an attorney's-fee award in connection with [plaintiff’s] suit for declaratory judgment, whether [defendant] would have been entitled to the same award in connection with its own breach-of-contract claim was of no moment.” Lion Co-Polymers, 2018 Tex. App. LEXIS 4835, at *37. In other words, if plaintiff is the one who merely tacks on a declaratory judgment to a mature breach of contract claim, the plaintiff cannot complain of defendant’s fee award under the declaratory judgment act.

A trial court does not abuse its discretion in a declaratory judgment action on a non-competition agreement where the court resolved the case by modifying the non-competition agreement and determined that neither side entitled to fees and each side should bear its own costs. Tuttle v. Builes, No. 11-17-00096-CV, 2019 Tex. App. LEXIS 2224, at *28-29 (Tex. App.—Eastland Mar. 21, 2019, no pet. h.).

Although the non-prevailing party may recover attorneys’ fees in a declaratory-judgment action, where reversal substantially affects the trial court’s judgment, the appellate court may reverse an attorney’s fee award or it may remand the attorneys’ fees award for reconsideration by the trial court. Ditech Servicing v. Perez, No. 13-17-00123-CV, 2018 Tex. App. LEXIS 7236, at *14-15 (Tex. App.—Corpus Christi Aug. 31, 2018, pet. denied) (mem. op.).

Trying to reverse an award based on it being “unfair” when the losing party was “operating in good faith, pursuing legitimate legal arguments” is not likely going to succeed as the standard is equitable and just (i.e. the antithesis of “unfair”) and, if fees are awarded under the declaratory judgment act, the appellate court will hold that the trial court impliedly found awarding fees to be
equitable and just. *Luna v. Bennett*, No. 05-16-00878-CV, 2018 Tex. App. LEXIS 9357, at *12-15 (Tex. App.—Dallas Nov. 15, 2018, no pet.) (mem. op.). This is particularly true when the losing party stipulates to the reasonableness and necessity of the prevailing party’s fees. *Id.* at *13-14.

*Luna* was a convoluted determination of heirship case following a divorce decree entered two days after the ex-husband died and in which the administrator sought to remove a cloud on the title of the ex-marital residence created by the ex-wife putting a deed of trust on the former marital residence to secure payment of her attorneys’ fees from the divorce. *Id.* at *1-4. The Dallas Court of Appeals upheld an award of fees to the administrator jointly and several against the wife, the trustee, and wife’s prior law firm (the latter two of whom were named parties in the heirship case, but not “real parties-in-interest”). *Id.* at *15-17. The court noted that (1) § 37.006(a) requires that “all persons who have or claim any interest that would be affected by the declaration must be made parties;” (2) the trustee and law firm were named in the petition, answered for all purposes, did not challenge their inclusion by verified denial, participated in the litigation, and only when the administrator had obtained a summary judgment and thereafter filed her motion for fees did they file a motion to dismiss, but apparently did not request a ruling until after the fees were awarded; and (3) case law permitted awards of fees to or against any party to the declaratory judgment action. *Id.* The lesson to be learned: If you are an improper party to a declaratory judgment action, get out before fees are awarded.

Even where the trial court dismisses a claim for declaratory relief for lack of jurisdiction, the trial court retains the power and authority to award attorneys’ fees under Chapter 37. See *Vinson Corrosion Control Servs. v. Walker Cty.*, No. 10-17-00337-CV, 2018 Tex. App. LEXIS 7833, at *3-4 (Tex. App.—Waco Sep. 26, 2018, no pet.) (mem. op.).

N. Texas Citizens Participation Act: Awarding Fees Mandatory for Granting Dismissal and Discretionary if Motion Found to be Frivolous or Purely Dilatory

Like declaratory judgments, the burgeoning TCPA § 27.009(a) attorneys’ fees jurisprudence could fill its own paper. However, one distinguishing factor is that the Texas Supreme Court has recently emphasized that the trial court must award attorneys’ fees to the successful movant. See *Tatum v. Hersh*, 559 S.W.3d 581, 584 (Tex. App.—Dallas 2018, no pet.) (citing *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)). The court in *Tatum* also noted that “the trial court has discretion in determining the award’s amount, ‘but that discretion, under [Chapter 27], does not also specifically include considerations of justice and equity.’” *Id.* at 584-585 (again quoting *Sullivan*, 488 S.W.3d at 299). Other courts have also drawn the distinction that, while the mandatory fees under § 27.009(a) must be reasonable, the “justice and equity” qualifier applies only “other expenses,” not attorneys’ fees. See *DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, at *861-863 (Tex. App.—Fort Worth 2018, no pet.).

However, in what is truly a double standard, § 27.009(b) provides the trial court has the discretion to award the non-movant’s attorney’s, but only when the trial court makes an express finding that the motion was frivolous or filed solely for the purpose of delay. See *Abatecola v. 2 Savages Concrete Pumping*, No. 14-17-00678-CV, 2018 Tex. App. LEXIS 4653, at *41-44 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op) (reversing the trial court’s fees award to the non-movant where the trial court made no express finding of frivolousness or delay).
One other difference is that at least one court has held that § 27.009(a)(1), which uses the language “reasonable attorney’s fees … incurred,” permits recovery of only those fees for which the defendant becomes personally liable. See MacFarland v. Le-Vel Brands LLC, No. 05-17-00968-CV, 2018 Tex. App. LEXIS 3386 (App.—Dallas May 15, 2018, no pet.) (mem. op.) (refusing to award contingency fee as the fees were not “incurred” in defending the case and relying on Cruz v. Van Sickle, 452 S.W.3d 503, 522-23 (Tex. App.—Dallas 2014, pet. denied) for its refusal to award fees for defendant represented pro bono as he did not become personally liable).

One frequent issue in TCPA cases is the timing of an appeal. The statute expressly authorizes interlocutory appeal of the trial court’s denial of a TCPA motion to dismiss; however, an appeal is premature and will be dismissed for lack of appellate jurisdiction as an impermissible interlocutory appeal where a trial court grants such motion, but delays granting or simply refuses to grant the prevailing defendant’s mandatory attorneys’ fees, and granting the motion does not dispose of all pending claims. See Seekra Realty, LLC v. Garner Paving & Constr., Ltd., No. 14-18-00984-CV, 2019 Tex. App. LEXIS 1102 (Tex. App.—Houston [14th Dist.] Feb. 14, 2019, no pet.) (mem. op.) (dismissing for lack of jurisdiction plaintiff’s impermissible interlocutory appeal where plaintiff obtained TCPA dismissal of defendant’s counterclaim, trial court failed to award fees, and plaintiff’s claims remained pending in the trial court).

In another premature TCPA appeal made while the defendant’s motion for attorneys’ fees was still pending, the Houston Fourteenth Court of Appeals held that the trial court’s failure to make a ruling on the attorneys’ fees motion in 30 days did not result in denial of the motion by operation of law. Leniek v. Evolution Well Servs., LLC, No. 14-18-00954-CV, 2019 Tex. App. LEXIS 2595, at *3 (Tex. App.—Houston [14th Dist.] April 2, 2019, no. pet. h.) (mem. op.). TCPA § 27.008, which provides that motions to dismiss not ruled on within 30 days are overruled by operation of law, does not apply to attorneys’ fees and costs submitted after court grants the motion to dismiss within the 30 day window (rejecting the appellant’s interpretation of D Magazine Partners, L.P., v. Rosenthal, 529 S.W.3d 429 (Tex. 2017) as, in that case, the trial court actually denied the requested fees). Id. at *3-4. Thereafter, the trial court retains plenary power to award attorneys’ fees, which are mandatory under the act. Id. The appellant then proposed that the appeal simply be abated pending the trial court’s ruling on the attorneys’ fees motion; however, the Houston Fourteenth Court of Appeals refused this request as prohibited by TRAP 27.2 as the appeal pending determination of the attorneys’ fees motion would result in more that a mere correction or clarification of the underlying order. Id. at *5-6. See also DeAngelis 556 S.W.3d 836, at *858-860 (trial court needs only make the dismissal decision 30 within days and can rule on sanctions, attorneys fees, and expenses thereafter).

However, the TCPA is silent on awarding fees where a claim the subject a TCPA motion to dismiss, but the trial court determines that the plaintiff lacks standing. In that case, at least one court has determined that, where plaintiff lacked standing (and, therefore, the court lacks subject matter jurisdiction), the trial court could not dismiss the case under TCPA and could not award attorneys’ fees under § 27.009(1). See Shankles v. Gordon, No. 05-16-00863-CV, 2018 Tex. App. LEXIS 6840, at *37-39 (App.—Dallas Aug. 27, 2018, no pet.) (mem. op.).
O. Enforcing Arbitration Awards: Typically No Additional Fees

“If an arbitration award includes an award of attorneys’ fees, a trial court may not award additional attorney fees for enforcing or appealing the confirmation of the award, unless the arbitration agreement provides otherwise.” Methodist Healthcare Sys., Ltd., LLP v. Friesenhahn, No. 04-16-00824-CV, 2017 Tex. App. LEXIS 9493 at *11 (Tex. App.—San Antonio Oct. 11, 2017, pet. denied) (mem. op.) (quoting Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied). See also Acra v. Bonaudo, No. 05-17-00451-CV, 2018 Tex. App. LEXIS 4987, at *17-20 (Tex. App.—Dallas July 3, 2018, no pet.) (mem. op.) (noting the general rule and exception for Rule 13 sanctions and rejecting the appellees argument (as based in inapplicable federal procedure) that fees may be awarded if the arbitration award challenge is “is ‘without merit’ and its refusal to abide by the award is ‘without justification.’”)). One other exception is in the event of bad faith. Methodist Healthcare, 2017 Tex. App. LEXIS 9493 at *11.

P. Covenants Not to Compete Act Preempts Contractual Provision, Declaratory Judgments Act, and Chapter 38

In Rieves v. Buc-ee's Ltd., 532 S.W.3d 845, 854 (Tex. App.—Houston [14th Dist.] 2017, no pet.), the employer brought suit to enforce a covenant not to compete. After a successful prosecution, Buc-ees sought attorneys’ fees under a contractual provision, Chapter 38, and the Declaratory Judgment Act. The employee objected and raised the Covenants Not to Compete Act as preempting all three means of recovering attorneys’ fees. See Tex. Bus. & Com. Code Ann. §§ 15.51(c) and 15.52. Citing numerous cases, the Houston Fourteenth Court of Appeals agreed finding the Covenants Not to Compete Act was the exclusive remedy and preempted the other recovery of attorneys’ fees under the other three methods.

Q. Texas Family Code § 157.167(a) for Failure to Pay Child Support

Awarding attorneys’ fees to a person enforcing a child-support order is mandatory “if the court finds that the respondent has failed to make child support payments. Tex. Fam. Code § 157.167(a).” See Adams v. Adams, No. 01-17-00305-CV, 2018 Tex. App. LEXIS 6675, at *2 (Tex. App.—Houston [1st Dist.] Aug. 23, 2018, no pet.) (mem. op.).

R. Ultra Vires Action against Public Officials under the UDJA

Recognizing that the issue was left “unanswered by Heinrich or any subsequent Texas Supreme Court case, the San Antonio Court of Appeals held that “a public official does not have governmental immunity from a claim for attorney’s fees ancillary to an award of prospective relief in an ultra vires action brought under the UDJA.” City of San Antonio v. Int'l Ass'n, Local 624, No. 04-17-00450-CV, 2018 Tex. App. LEXIS 6967, at *25-27 (Tex. App.—San Antonio Aug. 29, 2018, no pet.).

Prior to the 2009 amendments to Tex. Loc. Gov’t Code Ann. § 271.153(b), private litigants were not entitled to recover attorneys’ fees when suing local government entities on certain contracts, principally ones for goods and services. See El Paso Educ. Initiative, Inc. v. Amex Props., LLC, 564 S.W.3d 228, 246 (Tex. App.—El Paso 2018, pet. filed). However, the 2009 amendments moved attorneys’ fees into subsection (a), which enumerates the recoverable damages under this chapter, allowing for reasonable and necessary attorneys’ fees that are equitable and just. Tex. Loc. Gov’t Code Ann. § 271.153(a)(3).

T. Texas Debt Collection Practices Act (Tex. Fin. Code § 392.403(b) and (c)) Provide Fees for Successful Plaintiffs and Defendants on Finding of Bad Faith or Harassment.

While plaintiffs can recover attorneys’ fees if they prevail in a Texas Debt Collection Practices Act, defendants can only recover upon a finding that suit was brought in bad faith or for the purposes of harassment and, where the trial court make no such express finding, “the fact that the trial court declined to award attorneys’ fees associated with trial of the case … indicates that it did not make an implicit finding.” See Green v. Port of Call Homeowners Ass’n, No. 03-18-00264-CV, 2018 Tex. App. LEXIS 6937, at *39-40 (Tex. App.—Austin Aug. 29, 2018, no pet.) (mem. op.).

U. Tex. Labor Code Chapter 21 Employment Discrimination and Retaliation Claims

Chapter 21 of the Labor Code, which deals with certain employment discrimination and retaliation claims, allows a prevailing party to recover reasonable attorney’s fees as part of the costs of suit. See Tex. Labor Code Ann. § 21.259(a). However, prevailing employers have a higher threshold. See Miskevitch v. 7-Eleven, Inc., No. 05-17-00099-CV, 2018 Tex. App. LEXIS 5680, at *6-7 (Tex. App.—Dallas July 25, 2018, no pet.) (mem. op.). Therein, the Dallas Court of Appeals said:

However—following our federal counterparts—Texas courts have awarded fees to a prevailing employer only when the plaintiff’s claims were “frivolous, meritless, or unreasonable, or the plaintiff continued to litigate after it became clear that his claim was frivolous.”

Id. at *7 (quoting Elgaghil v. Tarrant County Junior Coll., 45 S.W.3d 133, 144-45 (Tex. App.—Fort Worth 2000, pet. denied)).

V. Chap. 38 Does Not Provide Attorneys’ Fees for Equitable Contribution Claims

Relying on Nelms v. Chazanow, 404 S.W.2d 359, 362 (Tex. Civ. App.—Houston 1966, no writ) (sub. op.) for the underlying principle that equitable contribution is based “upon the implied promise arising out of the relationship of the parties and not upon a written contract,” the Houston Fourteenth Court of Appeals concluded that Chapter 38 “does not authorize recovery of attorney's fees incurred in successfully pursuing an equitable-contribution claim.” See Orr v. Broussard, 565 S.W.3d 415, 424 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
W. TCPRC § 16.034(a) and Adverse Possession Claims

Under Texas Civil Practice & Remedies Code § 16.034(a)(1) and (2) if the prevailing party recovers possession of the property from a person unlawfully in actual possession, fees are mandatory upon a finding by the court that the person in actual possession made a groundless/bad faith adverse possession claim, but, without such a finding costs and reasonable attorneys’ fees are discretionary. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.034(a) and Riddle v. Smith, No. 07-18-00016-CV, 2018 Tex. App. LEXIS 7448, at *13-14 n.3 (Tex. App.—Amarillo Sep. 6, 2018, no pet.) (mem. op.). Notably, subsections (b) and (c) provide for a 10 day notice in order to recover fees. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.034(b) and (c).

X. Attorneys’ Fees as TCPRC § 10.002(c) and Rule 13 Sanctions

The El Paso Court of Appeals recently reviewed the appropriateness of both provisions for awarding sanctions in Darnell v. Broberg, 565 S.W.3d 450, 466-467 (Tex. App.—El Paso 2018, no pet.). In affirming the sanctions awards, the El Paso Court of Appeals recited:

An award of attorney’s fees is considered an acceptable sanction for violations of both Chapter 10 and Rule 13. Tex. Civ. Prac. & Rem. Code Ann. § 10.004 (stating that a sanction may include the reasonable expenses incurred by the other party as the result of the sanctionable conduct, including reasonable attorney’s fees); Tex. R. Civ. P. 13 (stating that a sanction may include any available under Rule 215, which in turn allows a court to order the sanctioned party to pay the reasonable expenses, including attorney’s fees, that the opposing party incurred as the result of the sanctionable conduct).

Id. at *28-29. It also noted that “direct relationship between the particular offensive conduct and the sanction imposed, and the sanction must not be excessive vis-à-vis that conduct.” Id. at 467 (quoting CHRISTUS Health Gulf Coast v. Carswell, 505 S.W.3d 528, 540 (Tex. 2016)).

Y. Tax Collection and Property Foreclosure Suits


Z. Texas Uniform Fraudulent Transfer Act Awards Equitable and Just Fees

Pursuant to the Texas Business & Commerce Code § 24.013, the court “may award costs and reasonable attorney’s fees as are equitable and just” in cases involving the fraudulent transfer statute. See Jones v. Dyna Drill Techs., LLC, No. 01-16-01008-CV, 2018 Tex. App. LEXIS 6689, at *31-32 (Tex. App.—Houston [1st Dist.] Aug. 23, 2018, no pet.) (mem. op.).
AA. No Attorneys’ Fees for Civil Contempt, Conversion, or Negligent Misrepresentation

“Absent a contractual or statutory basis, a trial court lacks authority to award attorneys’ fees based on a finding of contempt.” In re Patrick Daugherty, No. 05-18-00290-CV, 2018 Tex. App. LEXIS 4447, at *12 (Tex. App.—Dallas June 19, 2018, no pet.) (orig. proceeding) (mem. op.).

In consideration an objection to the appellee’s failure to segregate fees in a case in which the plaintiff pleaded for conversion and negligent misrepresentation among other things, the Houston Fourteenth Court of Appeals noted that fees are not recoverable for these causes of action citing:


See Corey v. Rankin, No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224, at *26 (Tex. App.—Houston [14th Dist.] Nov. 13, 2018, no pet.) (mem. op.). See also John DeLoach Enters. v. Telhio Credit Union, Inc., No. 04-17-00820-CV, 2019 Tex. App. LEXIS 1963, at *23-25 (Tex. App.—San Antonio Mar. 13, 2019, no pet. h.) (also finding Chapter 2303, the Vehicle Storage Facility Act, does not provide for an award of attorney’s fees to private litigants; § 2308.404 provides that a towing company, booting company, or parking facility owner may be civilly liable to a vehicle owner if it violates Chapter 2308, but does not establish any civil liability for a vehicle storage facility, much less attorneys’ fees against it; and § 2308.458 only provides attorneys’ fees for the party prevailing at an administrative hearing prescribed by the section).

VII. MISCELLANEOUS

A. The Dangers of Severing Attorneys’ Fees from the Underlying Action Authorizing Them

We often hold the attorneys fees for a separate bench trial. For efficiency sake, we often agree to submit them post-verdict or post-summary judgment. This is often done informally, without the entry of a specific order, such as an order for separate trial under Rule 174(b); rather, the bench and parties simply agree to do so and the court does not enter a final judgment until the fees claim has been resolved. However, be careful not to allow the judgment on the underlying cause of action authorizing those fees to become final, directly or by being severed. And especially do not agree to sever your attorneys’ fees claim from the underlying cause of action allowing for the underlying action to become final as that is an improper severing of a single cause of action in violation of Rule 41. See Barclay v. Richey, No. 09-17-00026-CV, 2019 Tex. App. LEXIS 456, at *24-28 (Tex. App.—Beaumont Jan. 24, 2019, pet. filed) (mem. op.). This is another case with a tortured procedural history leading to an arguably inequitable result.78 In Barclay, Barclay obtained a pre-trial declaratory judgment and the trial court, on Richey’s motion, then severed that declaratory

78 By way of full disclosure, our firm was involved in the case, but the authors came to this conclusion before they realized it involved our firm.
judgment allowing the judgment to become final (Claim 1). Barclay did not seek attorneys’ fees on the declaratory judgment in Claim 1 before it became final as the severance order specifically proclaimed it did not dispose of Barclay’s claim for attorney’s fees on her declaratory judgment claim, but rather continued the attorney’s fees request with the remainder of the case (i.e. Claim 2). Claim 1 was not appealed. Months later, Claim 2 went to trial, whereat Barclay sought fees on Claim 1 declaratory judgment pursuant to the terms of the severance order. The trial court denied Barclay’s attorney’s fees request on the declaratory judgment (Claim 1) due to having lost plenary power over Claim 1 long before claim 2 was tried. Claim 2 was then appealed and Barclay raised the trial court’s failure to consider Claim 1 attorney’s fees in compliance with the severance order. While the Beaumont Court of Appeals found that the trial court had improperly severed a single cause of action (the declaratory judgment’s liability from its attorneys’ fees claim), it also found that that error was part of Claim 1, which had not been appealed, not Claim 2, which was up on appeal. Thus, it upheld the trial court’s finding that it had lost plenary power to consider the attorney’s fees in Claim 1.

Although this was a declaratory judgment claim, presumably this has broader implications for other cases in which attorneys’ fees are recoverable. Therefore, do not allow a liability/damages finding to be severed into one cause and your attorneys’ fees claim into another. Alternatively, be sure to submit and obtain a ruling on your attorneys’ fees within 30 days of the severance order or the severed claims judgment while the trial court still has plenary power or file a motion for new trial or other post-judgment motion to extend the trial court’s plenary power in the severed action.

**B. One Satisfaction Rule: Fraud, Punitive Damages, and Attorneys’ Fees**

The one satisfaction rule prevents a plaintiff from recovering both punitive damages for fraud and attorneys’ fees for breach of contract where there is only a single injury. See *Pollitt v. Comput. Comforts, Inc.*, No. 01-17-00067-CV, 2018 Tex. App. LEXIS 8102, at *3-5 (Tex. App.—Houston [1st Dist.] Oct. 4, 2018, no pet.) (mem. op.).

**C. No Pre-Judgment Interest on Fees, Unless Fees Have Already Been Paid**

*Alma Investments, Inc. v. Bahia Mar Co-Owners Assoc., Inc.*, involved a part of never ending litigation concerning unpaid maintenance association fees at a condominium complex on South Padre Island. See 497 S.W.3d 137, 145-46 (Tex. App.—Corpus Christi 2016, pet. denied). Due to pre-trial rulings, only damages and attorneys’ fees were tried, resulting in an award of approximately $450,000 in maintenance fees and $291,000 in attorneys’ fees through trial and an additional $50,000 in appellate fees. The court of appeals recognized a split in authority between its sister courts and silence from the Texas Supreme Court on whether pre-judgment interest may be taxed against an attorneys’ fee award. The Corpus Christi Court of Appeals resolved the conflict by ruling that, as a general matter, pre-judgment interest is not recoverable on attorneys’ fees; however, an exception to that general rule exists and pre-judgment interest is recoverable on attorneys’ fees paid prior to the entry of judgment.

**1. PRACTICE POINTERS – Prove Up Paid Fees**

If the claimant has been paying fees all along, prove that up and that *Alma Investments* controls.
2. PRACTICE POINTERS – Hybrid Fee Arrangements

If seeking fees and you have a hybrid fee arrangement involving a retainer plus a percentage, be sure to segregate the fees (paid and to be paid) and consider requesting two separate lines on the through-trial fees question. Alternatively, consider how you will make a record that will support recovery of pre-judgment interest on those fees paid.

3. PRACTICE POINTERS – Defending Pre-Judgment Interest on Fees

If defending against paid fees, argue that Carbona v. CH Med., Inc., 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.) is correct. If that fails, develop a record of when the fees were paid and try to reduce the interest to only the time since actual payment occurred (even if plaintiff has been paying monthly). This may require a lot of accounting, but in larger cases it could save considerably on pre-judgment interest. For example, Alma Investments was 8 years old at the time of trial. If some of the fees were paid in the last year, you would not want to pay 40% (8 years time 5% per year) on the fees paid in the last year.

D. Post-Judgment Interest on Conditional Appellate Fees Begins to Accrue on Date of Appellate Decision Made Final

In Urquhart v. Calkins, No. 01-17-00256-CV, 2018 Tex. App. LEXIS 5145, at *16-17 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet. h.) (mem. op.), the court recognized that:

[P]ost-judgment interest on conditional appellate fees (as opposed to other post-judgment interest) accrues from the date the award is made final by the appropriate appellate court's judgment. Ventling, 466 S.W.3d at 156.

E. Defendant’s Right to Attorneys’ Fees Survives Plaintiff’s Non-Suit

Even though a defendant has not asserted counterclaim or a claim for affirmative relief, if in her answer she sought attorneys’ fees purely for defending the claim, that right survives a plaintiff’s non-suit under Rule 162, particularly if sought and awarded while the trial court still has plenary power. See In the Interest of N.M.B., No. 14-17-00317-CV, 2018 Tex. App. LEXIS 7606, at *2 (Tex. App.—Houston [14th Dist.] Sep. 18, 2018, no pet.) (mem. op.) (noting that one of two exceptions in Rule 162 provides: “[a] dismissal under this rule shall have no effect on any motion for sanctions, attorney’s fees or other costs, pending at the time of dismissal, as determined by the court” and not requiring that a motion for award of attorneys’ fees be pending at the time of the non-suit.) See also Kelsall v. Haisten, 564 S.W.3d 157, 161-164 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (defendant’s claims for attorneys’ fees in her answer were affirmative relief surviving plaintiff’s non-suit and her failure to pay the clerk the fee for counter-claim did not deprive court of jurisdiction to hear and award attorneys’ fees claim (as court has discretion to hear)).
F. No Bonding on Appeal for Attorneys’ Fees

In re Nalle Plastics Family L.P., involved a mandamus. 406 S.W.3d 168 (Tex. 2013). After trial, Nalle sought to appeal the judgment. In order to suspend enforcement of the judgment pending appeal, Nalle deposited a cashier’s check with the trial court in the amount of $132,661, which covered the portion of the damages awarded for Porter’s breach of contract claim, pre- and post-judgment interest, and court costs. Porter complained that Nalle had posted an inadequate security, because it did not include the $150,000 in attorneys’ fees awarded under Chapter 38. The trial court agreed and ordered Nalle to supplement its bond to cover the $150,000 fee award. The Texas Supreme Court analyzed Texas Civil Practice and Remedies Code section 52.006(a) and the definition of “compensatory damages” and held (1) that attorneys’ fees are not compensatory damages and (2) that a judgment debtor need not post an appellate bond guaranteeing attorneys’ fees awarded pursuant to Chapter 38. Specifically, the Texas Supreme Court reversed the decision of the Thirteenth Court of Appeals and held that Texas Civil Practice and Remedies Code section 52.006(a) only requires that a bond be posted to cover “compensatory damages awarded in the judgment[,] . . . interest for the estimated duration of the appeal[,] and . . . costs awarded in the judgment.” The court reasoned that the attorneys’ fees awarded did not constitute “compensatory damages” under § 52.006(b)(2) and that “[c]ourt’s have long distinguished attorney’s fees from damages.” The court also recognized that Chapter 38 itself contemplates that attorneys’ fees are “in addition to the amount of a valid claim and costs.” Further, the court stated that while attorneys’ fees for the prosecution or defense of a claim were compensatory in nature, “they are not, and have never been, damages.” The court next examined whether the attorneys’ fees award should be considered “costs” as contemplated by section 52.006(b)(2). The court remarked that “costs,” when used in legal proceedings, referred to expenses paid to the courts and the court’s officers, not every expense incurred by a party. The court further remarked that it had recognized for decades that “the term ‘costs’ is generally understood [to mean] the fees or compensation fixed by law collectible by the officers of court, witnesses, and such like items, and does not ordinarily include attorney’s fees which are recoverable only by virtue of contract or statute.” Accordingly, the court found that the term “costs,” as the term is used in the Texas Civil Practice and Remedies Code, was not intended to include “litigation costs.” In line with this reasoning, the court held that the trial court erred in requiring Nalle to deposit the $150,000 award for attorneys’ fees under Chapter 38.

G. Award of Appellate Attorneys’ Fees Must Be Conditioned on Success at the Appellate Level

Even as sanctions, a judgment should condition appellate fees on the condition that the party prevail on appeal. See Alwazzan v. Isa Ali Alwazzan & Int'l Agencies Co., No. 01-16-00589-CV, 2018 Tex. App. LEXIS 10039, at *64-65 (Tex. App.—Houston [1st Dist.] Dec. 6, 2018, no pet. h.). However, the appellate court can modify the judgment to reflect the appellate fees are contingent. Id. at *65.79

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79 For a discussion of what is a successful appeal, see Section IV. Prevailing Party, J. Only Successful Appeal Results in Appellate Attorneys’ Fees, supra at p. 37.
H. Where Damages Reduced on Appeal Should Remand for Reconsideration of Attorneys’ Fees

In Douglas v. Sims, the Dallas Court of Appeals recognized that:

Generally, when damages are reduced on appeal, the appellate court should remand for a new trial on attorneys’ fees unless it is “reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered.” Young v. Qualls, 223 S.W.3d 312, 314 (Tex. 2007) (per curiam) (quoting Barker v. Eckman, 213 S.W.3d 306, 314 (Tex. 2006)).

No. 05-17-01187-CV, 2019 Tex. App. LEXIS 1415, at *29-30 (Tex. App.—Dallas Feb. 26, 2019) (mem. op.), supp. op., 2019 Tex. App. LEXIS 2103 (March 19, 2019, no pet. h.). Therefore, if you are seeking to have the plaintiff’s damages reduced on appeal, you should also assert that the attorneys’ fees should be remanded for reconsideration and attempt to establish that the jury’s attorneys’ fees award was influenced by the erroneous damages amount.

I. You Prevail, But Deem Your Attorneys’ Fees Award to Be Inadequate (or None are Awarded at All), You Must File Your Own Notice of Appeal per TRAP 25.1(c)

In Locke v. Briarwood Village, the appellee sought to challenge an inadequate attorneys’ fees award; however, the Houston Fourteenth Court of Appeals noted that the appellee had not filed a notice of appeal and, therefore, refused to consider the request as it would have resulted in altering the trial court’s judgment by obtaining greater relief. No. 14-17-00113-CV, 2018 Tex. App. LEXIS 8832, at *8-9 (Tex. App.—Houston [14th Dist.] Oct. 30, 2018, no pet.) (mem. op.). In rejecting the appellee’s request, the court explained:

Rule 25.1(c) requires a party seeking to alter the trial court’s judgment to file a notice of appeal. Tex. R. App. P. 25.1(c). An appellate court may not grant a party who did not file a notice of appeal more favorable relief than the trial court did. Id. Because Briarwood Village did not, we cannot consider its request for additional fees. See Reich & Binstock, L.L.P. v. Scates, 455 S.W.3d 178, 185 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (“Although not couched as such, Scates’s issue would require us to alter the trial court's judgment because appellate attorney’s fees were not awarded in the judgment.”).

J. Attorneys’ Fees Awards Are Not Subsumed in Appellate Issue Attacking Grounds for Awarding Them

We naturally assume that, if we successfully attack and obtain a reversal of the plaintiff’s cause of action giving rise to the award of attorneys’ fees, the fees awarded will be reversed as well. However, that is not necessarily the case if you do not raise a separate appellate issue complaining that, if you succeed in reversing the cause of action, then the fees have no foundation and must be reversed. See In re AJBJK, L.L.P., No. 01-18-00772-CV, 2018 Tex. App. LEXIS 10028, at *9 (Tex. App.—Houston [1st Dist.] Dec. 6, 2018 no pet.) (orig. proceeding) (mem. op). This case involved a trial on a declaratory judgment, injunctive relief, and damages. After a bench trial, the trial court found for the plaintiff on all three and awarded $1,400 in damages plus attorneys fees.
The defendant appealed raising issues with the declaratory judgment and injunctive relief, which were both reversed and rendered. However, the defendant did not appeal the damages or the attorneys’ fees. The plaintiff then appealed to Supreme Court, which eventually affirmed the court of appeals, issued a mandate, and returned case to trial court to enforce the modified judgment. The defendant sought to further modify the judgment to eliminate the attorneys’ fees, which the defendant claimed had been implicitly overruled by the appellate court reversing the underlying basis for the attorneys’ fees, i.e. the declaratory judgment. The trial court agreed, granting the motion to modify. The plaintiff filed a mandamus and the appellate court reversed holding the trial court no longer had plenary power to alter the judgment more than that rendered by the appellate court. As a result, the defendant still owed the attorneys’ fees despite the plaintiff having no grounds to recover them.

However, any award of attorneys’ fees based upon a void order must also be void. In re Bishop, No. 05-18-01333-CV, 2018 Tex. App. LEXIS 10386, at *4-5 (App.—Dallas Dec. 17, 2018, no pet. h.) (orig. proceeding) (involving a default judgment issued in an election contest, which is prohibited by the Texas Election Code, and, hence, the default judgment was void); and In re McCray, No. 05-13-01195-CV, 2013 Tex. App. LEXIS 13818, at *2 (Tex. App.—Dallas Nov. 7, 2013, no pet.) (orig. proceeding) (mem. op.) (habeas corpus proceeding collaterally attack on the commitment order that had been entered in violation of mandatory procedural safeguards).

1. PRACTICE POINTER

On appeal, if your attack the underlying cause of action that are grounds for attorneys’ fees award, you must still raise an issue also seeking reversal of attorneys’ fees.

K. Appealing the Denial of a Rule 91a Motion to Dismiss: Mandamus, Permissive Interlocutory Appeal, or Appeal from Final Judgment

Under Texas Rule of Civil Procedure 91a, the trial court must award fees to the party who succeeds on the motion. Marshall v. Enter. Bank, No. 10-16-00379-CV, 2018 Tex. App. LEXIS 7421, at *14-15 (Tex. App.—Waco Sep. 5, 2018, pet. filed) (mem. op.). This means that, if the court denies the defendant’s Rule 91a motion to dismiss, the court should award the plaintiff attorneys’ fees. This is true even though the party who loses on the motion might ultimately prevail on the merits of the case. This issue was addressed by the Texas Supreme Court in ConocoPhillips v. Koopmann, 547 S.W.3d 858 (Tex. 2018). In that case, the Texas Supreme Court specifically recognized that denials of Rule 91a motions to dismiss may be appealed by mandamus or permissive interlocutory appeal (assuming the criteria can be met); however, it did not specifically authorize raising the denial of the defendant’s Rule 91a motion to dismiss in the appeal of a defendant’s later successful motion for summary judgment on the same grounds as the denied motion to dismiss. Notably, Koopman had a complicated procedural history as the final summary judgment was affirmed by the court of appeals, but was not appealed by either party to the Texas Supreme Court. Therefore, the Texas Supreme Court did not address the third route to appeal the

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80 The Texas Supreme Court denied the petition and petitioner filed a motion for rehearing on March 27, 2019.
81 See also In re Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (per curiam) (orig. proceeding) (recognizing that orders denying Rule 91a motions to dismiss may be reviewed by mandamus).
denial of a Rule 91a motion to dismiss. In In re HMR Funding, LLC, the Fourteenth Court of Appeals provides that third route, saying:

Thus, Koopmann does not preclude HMR Funding from appealing a final grant of summary judgment in its favor on the ground that the trial court erred in denying it even more favorable relief: a Rule 91a dismissal and recovery of attorney’s fees.


1. Practice Pointer: If You Intend to Appeal the Denial of Your Rule 91 Motion to Dismiss, Best Practice is Mandamus Immediately after the Denial

One of the criteria of a permissive appeal is that it involve an order concerning either a controlling question of law or that an immediate appeal may materially advance the ultimate termination of the litigation. Id. at 665. HMR Funding’s permissive appeal failed to establish either. Id. HMR Funding mandamus was denied in part as untimely. Id. at 666.

2. Practice Pointer: If You Wait until Final Judgment, You Must Appeal Your Own Summary Judgment

If your Rule 91a motion to dismiss is denied and you later obtain a summary judgment on essentially the same grounds, if you want to obtain your attorneys’ fees for the Rule 91a motion to dismiss, you must appeal your own summary judgment. Id. at 666-667. In fact, if you lose a Rule 91a motion to dismiss, later win the case on any grounds in any fashion, and wish to appeal the denial of the motion to dismiss, you should be able raise this on final judgment and appeal according to the logic in In re HMR Funding.

L. TRAP 45 Provides for Attorneys’ Fees for Frivolous Appeal

In Jennings v. Martinez, the appellee sought his attorneys’ fees claiming the appellant’s appeal was frivolous. No. 01-17-00553-CV, 2018 Tex. App. LEXIS 8520, at *11 (App.—Houston [1st Dist.] Oct. 18, 2018, no pet.) (mem. op.). In refusing to find the appeal frivolous, the Houston First Court of Appeals explained the standard:

We may award just damages to a prevailing party if we objectively determine, after considering “the record, briefs, or other papers filed in the court of appeals,” that an appeal is frivolous. An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. Rule 45 does not require an award of damages in every case in which an appeal is frivolous.

Id. at *11-12 (internal citations omitted).
1. **PRACTICE POINTER:** In frivolous appeal, you must present your fee application to the appellate court in your brief.

While finding the appellant’s appeal to be meritless, the San Antonio Court of Appeals swept aside the appellee’s request for sanctions under TRAP 45 as the appellee “did not provide this court any proof of reasonable and necessary attorney’s fees incurred in defending this appeal. Its request for sanctions is waived.” *Speirs v. Union Pac. R.R. Co.*, No. 04-18-00343-CV, 2019 Tex. App. LEXIS 786, at *6-7 (Tex. App.—San Antonio Feb. 6, 2019, no pet. h.) (mem. op.). Further, given that the decision was made based on the briefing and not a post-opinion submission, you should file your fee application with your brief.

M. **Contractual Provision Providing Attorneys’ Fees for Only One Party Are Not Per Say Unconscionable**

In *Venture Cotton Cooperative v. Freeman*, the Texas Supreme Court held:

> Parties are generally free to contract for attorney’s fees as they see fit. *Intercontinental Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Thus, a contract that expressly provides for one party’s attorney’s fees, but not another’s, is not unconscionable per se. Although perhaps relevant to a broader inquiry into contractual oppression or an imbalance in bargaining power, the attorney’s fee provision here is not, standing alone, decisive proof of an unconscionable bargain. Moreover, the court of appeals itself concludes that the arbitration agreement did not waive the farmers’ statutory right to attorney’s fees under section 38.001 and so its relevancy to the court’s unconscionability analysis is unclear.

435 S.W.3d 222, 231 (Tex. 2014). The Texas Supreme Court does not appear to have addressed the Corpus Christi Court of Appeals holding that limiting the award of attorneys’ fees to those expressed in the contract violates the farmers’ statutory right to attorneys’ fees under Civil Practice and Remedies Code section 38.001. *Id.*

N. **Contractual Indemnity Generally Does Not Apply to Suits between the Contract Parties Precluding Recovery of Attorneys’ Fees Expended on the Underlying Action**

In *Claybar v. Samson Exploration, LLC*, Claybar entered a contract with Samson to run an amine plant on Claybar’s property and Samson subcontracted the plant’s operation to Kinder Morgan. One of Kinder Morgan’s pumps failed and polluted Claybar’s property, resulting in Claybar bringing a property damage claim against Kinder Morgan and Samson. After Kinder Morgan settled, Claybar and Samson disputed whether the indemnity agreement in the Claybar-Samson contract required Samson to reimburse Claybar for the attorneys’ fees he incurred in prosecuting the property damage case against Kinder Morgan. *See generally Claybar*, No. 09-16-00435-CV, 2018 Tex. App. LEXIS 928 at *1-3 (Tex. App.—Beaumont Feb. 1, 2018, pet. denied) (mem.op.). After reviewing the contractual provision, the Beaumont Court of Appeals rejected Claybar’s argument, saying:

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82 Motion for extension of time granted on April 11, 2019, ordering petition for review due May 8, 2019.
The plain language of the indemnity provision does not show that the parties intended for Samson to indemnify Claybar for attorney's fees and costs in pursuing claims against Samson and Kinder Morgan for damages to Claybar's property. If Samson and Claybar had intended to include claims between them, they would have had to specifically add such language to the Agreement. See id. We hold that there is no specific language in the Agreement that would overcome the general rule that indemnity agreements do not generally apply to claims between the parties to the agreement. Because the indemnity provision does not apply to claims between Claybar and Samson, Claybar had to show that a third party had filed a claim against Claybar to prove that the indemnity provision applied; Claybar has failed to do so.

Id. at *9-10 (emphasis added and internal citations omitted). An alternative solution to this problem is to have an attorneys’ fees provision in the contract allowing for the prevailing party to recover its fees related to the litigation.

O. Choice of Law/Preemption

As mentioned earlier, if Texas law does not apply—whether by choice of law (contractual, statutory, or common law) or preemption—then Chapter 38 does not apply, regardless of whether the case is brought in Texas state courts.

1. Carmack Amendment Preempts State Law Attorneys’ Fees Claims

In Daybreak Express, Inc. v. Lexington Insurance Co., Lexington sued Daybreak Express (the shipper) in a subrogation action in connection with property damage that occurred during the interstate shipment of electronic equipment owned by Burr Computer. See 417 S.W.3d 634 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Specifically, Lexington sued Daybreak Express and pleaded causes of action for breach of contract (Daybreak’s alleged failure to honor a settlement agreement with Burr), indemnity, contribution, unjust enrichment, and, eventually, the Carmack Amendment. The trial court awarded Lexington $87,500 plus attorneys’ fees. Citing prior federal and Texas cases, the Houston Court of Appeals reversed the award of fees holding that preemption (which applied impliedly as the scope of the federal law indicated that Congress intended to exclusively occupy the field) under the Carmack Amendment includes claims for attorneys’ fees under state law. Id. at 638-39.

2. Federal Maritime Law Precludes Texas’ Chapter 38

In Texas A&M Research Foundation v. Magna Transportation, Inc., the Fifth Circuit held that the general rule of maritime law, which follows the American Rule that parties bear their own costs, coupled with the need for uniformity in federal maritime law, precludes the application of state attorneys’ fee statutes, such as Chapter 38, to maritime contract disputes. See 338 F.3d 394 (5th Cir. 2003). Specifically, the Fifth Circuit explained:

Although the question is a matter of first impression in this circuit, two other circuits have directly addressed it. Citing the “strong interest in maintaining uniformity in maritime
the Third Circuit has held that the various state statutes providing for attorney fees should not be applied in federal maritime disputes.

Similarly, the First Circuit has held that state law is inapplicable to the question of attorneys’ fees in maritime contract disputes, noting that state law cannot apply where it conflicts with maritime law and concluding that the fee statute at issue contradicted the general rule of maritime law that “parties pay their own fees absent bad faith or oppressive litigation tactics.” We likewise conclude that the general rule of maritime law that parties bear their own costs, coupled with the need for uniformity in federal maritime law, precludes the application of state attorneys’ fee statutes, such as § 38.001, to maritime contract disputes.

Id. at 406.

P. State Bar Fees Survey for Proving Usual and Customary Rates

Every two years or so, the State Bar of Texas publishes a survey of fees. It is broken into regions, types of litigation, experience levels, etc. While it is probably more helpful for attorneys seeking a moderate rate, it should be some evidence that the average fee is usual and customary. Alternatively, if your opposing counsel is seeking a high hourly rate, it might be some evidence of a more reasonable hourly fee. Either way, get the latest copy and ask the court to take judicial notice of it. A copy of the latest survey can be located in Appendix B. 83

This survey was used in at least one case to support the controverting affidavit. See Hogg v. Lynch, Chappell & Alsup, P.C., 553 S.W.3d 55, 75-76 (Tex. App.—El Paso 2018, no pet.). This was a suit against a former client in a probate case to recover unpaid fees in which the client argued that the fee was unconscionable. 84 While the El Paso Court of Appeals rejected many of the controverting attorney’s opinions as conclusory, it specifically found his reliance on the State Bar survey to have some probative force. Conversely, in another case, the fee applicant attached the survey to her affidavit to prove that her hourly rate was reasonable as it was below the median hourly rate for an attorney with the same experience in Harris County. See Propel Fin. Servs., LLC v. Perez, No. 01-17-00682-CV, 2018 Tex. App. LEXIS 5792, at *14 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.) (mem. op.) (in fact, the appellate court reversed the trial court’s no fee award and rendered judgment for the amount sought in the fee application.)

Other surveys exist. For instance, the plaintiff’s expert used the 2015 American Intellectual Property Law Association in Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017

83 As far the authors can tell from a review of the State Bar of Texas website research page just prior to publication, the last survey was done in 2015 and released in 2016. We would anticipate a new one soon.

84 Probate cases permit contingency fee agreements. The Probate Code specifically permits up to a one-third contingency fee, even higher with prior court approval. Hogg, 2018 Tex. App. at 73-74. In Hogg, the fee changed from hourly to contingency during the representation. Whenever the fee arrangement switches from an hourly rate to a contingency fee, counsel ethically must advise the client to seek review by outside counsel of new arrangement. Of course, once so advised, the client may waive that right. Id. at 61-62. Most of this opinion deals with (1) a sanction imposed on Hogg for allegedly failing to produce recorded statements and (2) her allegations that the fee was unconscionable. The court notes that all attorneys’ fees contracts are closely scrutinized and, unlike other contracts, ethical considerations overlay the attorney-client contractual relationship. Id. at 73-74.
Q. Discovery Issues

1. Disclosure: Attorneys’ Fees Not Economic Damages Requiring Disclosure under Rule 194.2(d)

In *Carter v. Flowers*, TMC argued that the Flowers’ attorneys’ fees were not recoverable because Flowers did not disclose his attorneys’ fees under Rule 194.2(d), which requires disclosure of “the amount and any method of calculating economic damages.” No. 02-10-00226-CV, 2011 Tex. App. LEXIS 7829, at *16 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.). However, after applying rules of “statutory” construction to the rule’s language, the Fort Worth Court of Appeals ruled that attorneys’ fees are not “economic damages” and are therefore not required to be disclosed under rule 194.2(d).\(^{85}\) *Id.* at *17. *See also Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 660 (Tex. App.—Dallas 2012, no pet.).

2. Disclosure: Minimal Designation Is Sufficient under Rule 194.2(f)(3)

In *Corey v. Rankin*, the Houston Fourteenth Court of Appeals considered three objections to the Rankin’s expert designation of Evans: (1) it failed to provide the “general substance of [Evans’s] mental impressions and a brief summary of the basis for them;” (2) it did not include billing records and therefore failed to include “all documents, tangible things, reports, models, or data compilations;” and (3) it was inadequate to cover appellate fees. No. 14-17-00752-CV, 2018 Tex. App. LEXIS 9224, at *18-20 and *23-24 (Tex. App.—Houston [14th Dist.] Nov. 13, 2018, no pet.) (mem. op.). Evans’ designation stated that (1) he may testify as an attorneys’ fees expert, (2) Rankin has been forced to incur reasonable and necessary attorneys’ fees, and (3) his opinions were based on his experience, familiarity with the facts and circumstances of the case, and consideration of the *Arthur Andersen* factors. *Id.* at *18-19. It also provided a copy of his curriculum vitae. *Id.* at *19. The court, citing prior cases establishing the standard, found that “a disclosure identifying an attorney’s fees expert and stating that the expert will be testifying about the reasonableness and necessity of attorney’s fees is sufficient to give the ‘general substance’ of that expert’s testimony.” *Id.* Clearly, the bar is fairly low.

On the failure to produce contemporaneous billing records with the disclosure, the court held:

> We previously have held that an expert may testify as to attorney’s fees even if the underlying billing records were not produced in response to discovery requests. Therefore, the failure to produce billing records with Evans’s expert designation does not warrant excluding Evans’s testimony altogether.

\(^{85}\) Flowers also apparently failed to disclose his attorneys’ fees expert. Don’t do that. But, TMC waived the issue as it did not complain about any failure by Flowers to disclose his attorney as a testifying expert on attorneys’ fees under Rule 194.2(f).
Id. at 20. So, the actual supporting contemporaneous billing records need not be included with the response to request for disclosure and can be produced a later date without jeopardizing your attorneys’ fees expert’s testimony. Finally, the court found the designation adequate to include appellate fees concluding “this designation does not purport to limit Evans’s testimony to attorney’s fees incurred as part of the trial court proceedings.” Id. at *23. To be safe, we recommend stating that your attorneys’ fees expert will opine about fees at all level of the litigation, trial, intermediate appellate, petition for review, and briefing and oral argument at the Texas Supreme Court.

3. Late Production/Disclosure Does Not Necessarily Result in Exclusion of Attorneys’ Fees Proof and Witness

As mentioned earlier, courts are quite deferential when it comes to attorneys’ fees experts and proof. In Syrian Am. Oil Corp. v. Pecten Orient Co., Pecten pleaded a claim for attorneys’ fees well before trial and timely identified its lead counsel as its attorneys’ fees expert, but it did not identify the amount of fees sought or produce the billing records to support a fee award until the Friday before the Monday the case was called for trial. 524 S.W.3d 350, 366-367 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The trial court allowed the evidence. Id. at 366. The Houston First Court of Appeals began its analysis with the black letter law that evidence not timely disclosed or produced in response to proper discovery should be excluded, unless the proffering party establishes good cause or the lack of unfair surprise or prejudice, a determination over which the trial court has broad discretion. Id. at 366. The court then found that the trial court had not abused its discretion for the following reasons:

Courts have held that a trial court does not abuse its discretion in admitting testimony by an untimely designated attorney’s fees expert when, as here, the party’s pleadings contained a request for attorney’s fees well before trial. See, e.g., Rhey v. Redic, 408 S.W.3d 440, 459 (Tex. App.—El Paso 2013, no pet.) (holding that trial court did not abuse its discretion in admitting testimony from late-designated attorney’s fees expert where plaintiff requested attorney’s fees in petition filed five months before trial); Beard Fam. P’ship v. Comm’l Indem. Ins. Co., 116 S.W.3d 839, 850 (Tex. App.—Austin 2003, no pet.) (holding that trial court did not abuse its discretion in admitting testimony from untimely designated attorney’s fees expert where party requested attorney’s fees in initial petition). SAMOCO had notice that the damages Pecten sought were the attorney’s fees that Pecten had incurred through the litigation.

When SAMOCO objected to the proffered attorney’s fee testimony, the trial court ordered Pecten’s witness to make himself available for deposition so that SAMOCO could discover facts necessary to defend against the fee claim. SAMOCO did not seek a continuance of trial. Under these circumstances, we hold that the trial court did not abuse its discretion in admitting the attorney’s fee evidence supporting Pecten’s counterclaim. See, e.g., Wigfall v. Tex. Dep’t of Crim. Justice, 137 S.W.3d 268, 274 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (holding that trial court did not abuse its discretion in not excluding late-designated expert witness where party who sought exclusion did not request continuance or complain that delay left him unable to conduct his own discovery).

86 Will this change with Rohrmoos Ventures?
Id. at 366-367. See also High Mt. Ranch Grp., LLC v. Niece, 532 S.W.3d 513, 521-523 (Tex. App.—Texarkana 2017, no pet.) (late designation of attorneys’ fees expert excused where attorneys’ fees claim found in party’s original pleading, court offered postponement for discovery, and generally no apparent surprise); Corey, 2018 Tex. App. LEXIS 9224, at *20-23 (in addition to their objections under Rule 192.4(f)(3), appellants also raised trial court’s failure to enforce the mandatory exclusion provision of Rule 193.6 where the expert was designated 5 years before the trial, but his affidavit with the contemporaneous billing records were not produced until after the verdict; however, the appellate court found that “the trial court’s implied finding that the Rankin Appellees’ failure to timely produce the billing records did not unfairly surprise or unfairly prejudice the Corey Appellants.”)

4. Usually Cannot Get Opposing Parties’ Billing Records in Discovery

The Texas Supreme Court addressed a discovery dispute in a mandamus proceeding arising in the context of multidistrict litigation involving allegations of underpaid homeowner insurance claims. See In re Nat’l Lloyds Ins. Co., 532 S.W.3d 794 (Tex. 2017). The Texas Supreme Court was tasked with deciding whether a party’s attorney-billing information is discoverable when the party challenges an opposing party’s attorney-fee request as unreasonable or unnecessary, but neither uses its own attorney fees as a comparator nor seeks to recover any portion of its own attorney fees. The Court held that, under such circumstances, (1) compelling en masse production of a party’s billing records invades the attorney work-product privilege; (2) the privilege is not waived merely because the party resisting discovery has challenged the opponent’s attorney-fee request; and (3) such information is ordinarily not discoverable. Id. at 798-799. The Texas Supreme Court noted that there might be “unusual circumstances” that could create an exception.

The unanswered question is: What are those circumstances? The homeowners’ in National Lloyds sought the discovery as, in a similar case, National Lloyds’ defense counsel served as its attorneys’ fees expert and testified that (1) defense fees could be considered a factor in determining a reasonable fee recovery and (2) his firm’s billing practices (such as pro-rating tasks among all the files to which it applies and attending a hearing on multiple claims) constituted an example of proper billing practices to avoid an inflated fee claim. However, National Lloyds’ was not using that counsel as an expert in the underlying case and the expert rejected the two identified propositions. However, the Texas Supreme Court went on to say:

We acknowledge that an opposing party may waive its work-product privilege through offensive use—perhaps by relying on its billing records to contest the reasonableness of opposing counsel’s attorney fees or to recover its own attorney fees.

Id. at 807. Presumably, the two propositions cited by homeowners’ counsel might qualify as offensive use. Opening the door a bit wider, the Texas Supreme Court observed that an opposing party may provide an opening for discovery of its fees by designating its counsel as an expert. Id. at 813-814.

[T]he work-product privilege does not apply to “information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions.” Thus, the
tactical decision to designate counsel as a testifying witness provides the opposing party with the means to access information and attorney work product not otherwise available under the general scope of discovery.

_Id._ at 814. However, the Texas Rules of Civil Procedure permit only discrete tools to address expert discovery (request for disclosure, reports, and deposition). Here the homeowners used impermissible methods: interrogatories and requests for production.

In the dissent, Justice Johnson (joined by Justices Lehrmann and Boyd) believed the homeowners’ discovery was relevant as it was based on the insurers’ attorneys’ fees expert’s testimony in a prior case, which included his personal knowledge of having defended the case and using his bills as a comparison. _Id._ at 819. He went on to say:

But it is no ordinary situation for a party’s trial attorney to be designated as a testifying expert to dispute the opposing party’s attorney’s fee request—at least, it has not been. Things may well change after this case issues.

. . .

While there are certainly times when counsel’s experience, the roles undertaken by counsel, and varying motivations make a direct comparison of time spent on a case and fees charged for it inapt, there are just as certainly times when circumstances in particular cases might make a comparison highly appropriate. _See El Apple I, Ltd. v. Olivas_, 370 S.W.3d 757, 766 (Tex. 2012) (Hecht, J., concurring). When a party designates the attorney representing it in a case to testify and dispute another party’s fee request, the designation implies that the attorney will rely on his own experience in trying and billing cases comparable to the one in which he is designated to testify. If the attorney testifies and mitigating factors make a fee comparison between the parties inapplicable, then objections can be lodged based on the status of the evidence at the time the attorney testifies.

_Id._ at 820-821. Justice Johnson essentially concluded his dissent by saying:

What National Lloyds should not be able to do is have it both ways by using one of its trial attorneys to critique the time, fees, and other details of the homeowners’ attorney’s fees request, while screening from view its own attorneys’ time and fees in the same case for the same or similar activities.

_Id._ at 824.

**R. Computerized Research as Attorneys’ Fees**

Federal courts have recognized Westlaw and Lexis charges as attorneys’ fees. In _Thomason_, the trial court awarded Thomason $3,600 in Westlaw charges explaining “district courts have awarded these charges as attorney’s fees because computer-based legal research decreases the time attorneys spend on legal research.” _Thomason v. Metro. Life Ins. Co._, Civil Action No. 3:14-CV-86-K, 2018 U.S. Dist. LEXIS 35801, at *12 (N.D. Tex. 2018) (citing _Koehler v. Aetna Health Inc._, 915 F. Supp. 2d 789, 800 (N.D. Tex. 2013) (Furgeson, J.). We would note that MetLife did not

1. **PRACTICE POINTER: Seek Discovery on Westlaw/Lexis Charges and Object**

For the most part, our clients refuse to pay computerized research charges. Their billing guidelines consider Westlaw and Lexis to be overhead. If confronted by an application including computerized research charges, you should seek discovery of the plaintiff’s firm’s retention agreement and any guidelines by which they bill. Also, consider a deposition of the lead attorney or the managing partner of the firm and determine what the firm’s prevailing policy is with respect to computerized research. They may have numerous clients for whom they agree to include the charges as overhead. If nothing else, at least object and present evidence that, in today’s legal market, computerized research is considered overhead. However, you will need some proof to overturn these relatively recent decisions.

**VIII. A FEW THOUGHTS ON STRATEGY**

What follows are by no means the only issues one should consider in prosecuting or defending an attorneys’ fees claim. However, these issues should be considered early (at least one of them before filing suit) in the litigation, giving you plenty of time to adapt, if need be.

Additionally, these are multi-faceted issues for which there is no one answer that will always be right. We have not touched on all the considerations in each of these issues. However, what is certain is that each case will have its own considerations and, therefore, its own strategy.

**A. Forum**

Obviously, the plaintiff gets the first shot at selecting a forum. (Of course, the plaintiff is not always the attorneys’ fees claimant, much less the prevailing party.) If the plaintiff has options, it may be able to select between state and federal court and between counties/districts/divisions. This can go a long way to determining your judge and jury. On the other hand, the defendant may be able to remove or transfer. If attorneys’ fees may well be the largest single element of damage, each side should factor the attorneys’ fees claim into its forum decision.

We have not done an extensive analysis of state versus federal decisions; however, from the few federal cases we have read in preparation of this paper, it seems that the federal judges tend to be a little more lenient on proving up attorneys’ fees. This may simply be a function of the small sample size. Notably, in most federal cases, the fee application will be submitted to the bench in a Rule 54 motion, sometimes supplemented with an evidentiary hearing. Do you want the judge deciding your fees? Does the efficiency of motion practice appeal to your client or you? On the other hand, federal courts in diversity cases must follow the state substantive law, but not the evidentiary law, which could account for the slight difference. Federal courts are also known for high dollar disputes. (Hence the expression: “Don’t make a federal case out of it.”) If you think your fees may be high, perhaps federal court may be a better place for the claimant. If you are defending the claim, you may wish to remain in state court, unless the federal venue has only defense-oriented, stringent judges not well disposed to admitting evidence of or awarding huge
attorneys’ fees. Additionally, federal courts strongly resume lodestar results in a reasonable fee. That said Rohrmoos Ventures may have put Texas courts on equal footing there. Federal judges tend to deal with deficiencies in billing records (block billing, redactions, poor billing judgment, etc.) by sharing percentages off the fee (a percentage for each deficiency).

If you prefer to stay in state court, you may want to try to get as close to your attorneys’ hometown as possible. If you have a big-city, high-dollar law firm, you might prefer to have your case in Harris County, as opposed to Victoria County.

B. Judge vs. Jury

Attorneys’ fees claims are a jury issue in state court. If you have requested a jury and paid the fee, the jury fees issues should be submitted to the jury unless you clearly agree otherwise. See generally, Mintz v. Carew, No. 05-16-00997-CV, 2018 Tex. App. LEXIS 1194 at *4-10 (Tex. App.—Dallas Feb. 13, 2018, pet. denied) (mem. op.) (in which the court, asserting its policy of trying attorneys’ fees to the bench, had to convene a second jury hear the attorneys’ fees issue once it realized its error and the appellate court found that the appellee had not waived its right to a jury). You can even agree to divide the issue, submitting the total fees to the jury and the segregation issue to the bench. See Chevron Phillips Chem. Co. L.P. v. Kingwood Crossroads, L.P., No. 09-14-00316-CV, 2017 Tex. App. LEXIS 8952 at *25-26 (Tex. App.—Beaumont Sept. 21, 2017, no pet.) (mem. op.) (in which the appellate court enforced the agreement through two appeals and two remands despite Chevron’s request for a jury on the second remand).

Many lawyers reflexively opt for a judicial submission of attorneys’ fees. This makes some sense for the claimant given the gap-filling provisions of sections 38.003 and 38.004, assuming Chapter 38 applies. Most lawyers and clients also assume that submitting attorneys’ fees to the judge will be an inexpensive and efficient means of resolving the issue. Certainly, cost saving can be an important, if not the driving factor. Additionally, many lawyers hesitate to disclose their hourly rates and total fees to a jury fearing sticker shock and believing that a judge will be more understanding of those rates and fee totals. Recall the 2007 case in which the jury awarded $500 for trial and $300 for appeal all the way through the Texas Supreme Court considering those to be perfectly reasonable.

Jury reaction is certainly a concern, but you have to be prepared to present the issue to a jury as a question of fact. If your opposing counsel does not agree to submission to the court, you are stuck with a jury (assuming you are in a jury trial). Juries in smaller towns or rural counties may blanch at huge attorneys’ fees. Juries in Houston, Dallas, San Antonio, and Austin may be more sanguine. Needless to say, juries have awarded fees that are shockingly low (or none at all) as well as everything for which the claimant asked, which can be huge.

87 However, beware to what you agree. In In re Hulcher Servs., the Fort Worth Court of Appeals held that an agreement made on third day of the case’s second trial to try the attorneys’ fees issue to the bench did not prevent a party from seeking a jury trial on attorneys’ fees on remand to third trial (finding it is not procedural waiver and the scope of the Rule 11, based on the context (as opposed to the expressed words) was limited second trial). No. 02-18-00257-CV, 2018 Tex. App. LEXIS 8323, at *2-3 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.) (mem. op.). This reminds us of the infamous Richard Nixon quote: “I know you believe you understand what you think I said, but I am not sure you realize that what you heard is not what I meant.” It also proves the wisdom of never trying a case three times.
The judge is likewise a concern. What is the judge’s background? Did the judge formerly practice in “Big Law” with a high hourly rate or in a solo practice in a small town, or even in the DA’s department? Does the judge have a track record? Have you run a Westlaw or Lexis check on her for written opinions or appeals from her court?

Attorneys often assume that submitting the issue to the court means exchange of affidavits and little else. This should not necessarily be the case. Just like in a jury trial, the judge can hold a live hearing and receive live testimony. Indeed, as we have discussed, you may wish to have a hearing on attorneys’ fees. Having a hearing may allow the fees applicant to fill in gaps or resolve deficiencies in her proof. Conversely, it allows for cross-examination. If you have not prepared a counter-affidavit or presented controverting proof, you need a hearing to cross the claimants’ expert in an effort to develop controverting evidence. Otherwise, you have essentially conceded fees. Additionally, if you prepare affidavits and you have a hearing, the affidavit is effectively a report that can be used for cross-examination. Of course, having both affidavits and a live hearing may reduce the efficiency of submission to the judge.

Likewise, prosecuting or defending attorneys’ fees claims can make otherwise inadmissible evidence suddenly admissible. For instance, the conduct of the litigations can become relevant. Arguably, subject to Rule 104 evidentiary or in limine rulings, either side can cross-examine the opposing attorneys’ fees expert about how much time was spent on any given part of the case, which can open up testimony on strategy decisions and previously excluded evidence. For instance, if a claimant is criticized for seeking excessive fees, do you want its expert testifying that most of the fees were in response to the defendant’s scorched earth litigation strategy, much of which was denied by the court in pre-trial rulings. Conversely, the claimants may not wish to be forced to concede in front of the jury that it had to segregate fees for a now settled defendant. If motions to compel or sanctions have been asserted, the party against whom these have been filed will want mention of these excluded from trial under either a Rule 104 or in limine ruling, particularly for the attorneys’ fees evidence. That party will not want the opposing attorneys’ fees expert talking about the cost of working up the issue and preparing the motion, regardless of whether it was successful. Similarly, discovery battles should be subject to such a ruling. Recently, we have seen a case in which the plaintiff counsel conceded in his pre-suit settlement correspondence that, if a certain set of facts existed, plaintiff had no case. The court’s pre-trial rulings established those facts and the court then allowed the plaintiff’s counsel’s correspondence into evidence to show that the defendant’s attorneys’ fees (nearly three quarters of a million dollars) were reasonable given the plaintiff’s earlier concessions. You may have similarly devastating evidence that you would prefer to either get in front of a jury or avoid doing so, but, either way, the conduct of the litigation and the other evidence should be factored into your decision about whether to seek a judge or a jury on this issue. (And, can the impact of this type of evidence be ameliorated or amplified, depending on which way you need to go, by using a retained expert?)

If opposing counsel is going to be his own attorneys’ fees expert at trial and he is either obstreperous (or otherwise generally likely to make a poor witness) or his rates are really high or he has overworked the case, why would you let him off the hook by submitting the issue to the court (or, if to the court, by merely exchange of affidavits)?
If you decide to exchange affidavits and are prosecuting the attorneys’ fees claim, be sure you thoroughly cover all of the Arthur Andersen factors, provide evidence of lodestar, fully segregate and attach your contemporaneous billing records. Conversely, if you are defending the claim, make sure you put on controverting evidence, not just criticize the opposing counsel’s submission.

If you are going to waive a jury on this issue and present attorneys’ fees to the judge, the decision should be reached and a Rule 11 or stipulation confirming same entered. Whether you are presenting the matter to the judge may weigh on whether you need a retained expert. Most lawyers feel less compelled to hire an attorneys’ fees expert if the matter is going to be submitted to the judge. However, the decision needs to be made early enough to allow you to retain, develop, and designate an expert, if you have not already done so, and get them up to speed.

If you are the claimant and the matter is submitted to the court, be sure to ask for the presumption and judicial notice provided by section 38.003 and 38.004.

Of course, even if you agree to submit the attorneys’ fees issue to the court, you may still opt for a retained exert to present your side to the court.

C. Retained Expert vs. Trial Counsel

In smaller cases, the cost of an attorneys’ fees expert probably outweighs the benefits. However, in larger cases, strong consideration should be given to hiring an expert early in the case.

In either a large or small case, a true attorneys’ fees expert will understand the law (like presentment and segregation) and can assist you in setting up systems for tracking fees for later presentation. On the other side, the expert can be assigned the task of parsing through the claimant’s fees and assisting with developing discovery (including deposition questions and strategy) directed to the claimant.

By hiring a retained expert, you do not put your credibility on the line when you put on the attorneys’ fees evidence, particularly if you go with a jury. Whether before a judge or jury, you do not have to undergo cross-examination on your opinions and supporting data. A retained expert also can minimize some of the adverse effects of litigation conduct or harmful evidence by putting a little distance between the attorneys’ fees and the counsel’s conduct or bad evidence. (However, make sure that your expert is fully apprised so as not to be ambushed.).

Additionally, for claimants prosecuting the attorneys’ fees claim, some courts have ruled that experts are not “interested” witnesses and, therefore, do not suffer from the interested witness/uncontroverted evidence rule in Ragsdale and its progeny. See Cullins v. Foster, 171 S.W.3d 521, 538 n.17 (Tex. App.—Houston [14th Dist.] 2005, pet denied). So, if your expert puts on uncontroverted evidence, you may have a better shot at arguing that you are entitled to those fees as a matter of law.

If the debtor/defendant uses its own trial counsel as its expert, he must be designated and provide the substance of his opinions under Rule 194.2(f)(1)-(3). Likewise, he is “retained” requiring
compliance under Rule 194.2(f)(4). Does that also make his hourly rate and time worked on critiquing the claimant’s attorneys’ fees application discoverable and admissible separate and apart from any offensive use claim under \textit{In re National Lloyd’s}?

Critically, if you are defending an attorneys’ fees claim, do you want the claimant to assert that you are making an offensive use of your own hourly rates and fees or otherwise subject your bill to possible production or scrutiny through deposition. Of course, if you are also claiming fees, discovery of your bills is less of an issue. However, if you are not, this may be one of the biggest reasons to hire a retained expert to critique the claimant’s attorneys’ fees.

Finally, ask yourself one simple question: Who will be more persuasive in my case, trial counsel or a retained expert. If the answer is possibly a retained expert, then you should hire one. If nothing else, use him/her as a purely consulting expert. If you do end up designating the expert, you can always withdraw her later and go with trial counsel, assuming she has been designated.

\textbf{D. Discovery}

We are often surprised by how little discovery is directed at attorneys’ fees when it is frequently the single largest element of damages in the case. Approach the attorneys’ fees expert like any other and develop the underlying assumptions as well as the methodology. Both sides should strongly consider undertaking discovery. Put together a subpoena duces tecum asking for resumes, prior testimony on attorneys fees, billing invoices (although not the debtor/defending counsel’s invoices, unless you can find an exception to \textit{In re National Lloyd’s}), billing guidelines for the case (and others if you can get them), budgets prepared for the case, audits of bills (assuming the bills are audited, which you should certainly ask). Seek discovery on the presentment of the claim. Prior to any deposition, do your standard due diligence work-up on the attorneys’ fees expert. For instance, search for prior designations, disclosures, resumes (including his website), reports, affidavits, articles or writings on the subject (including CLE presentations), depositions, and hearing or trial testimony. Run Westlaw/Lexis searches for opinions in which the courts discuss his attorneys’ fees or his opinions about them. Send out a thorough subpoena duces tecum with your deposition notice and ask for production at least 10 days prior to the deposition. Prepare a thorough outline that covers all of the presentment (what was it, problems with it, excessive demand, negotiations, tender, etc.), \textit{Arthur Andersen} factors (focusing at least on the “bare minimum”), lodestar, segregation issues, how prevailing party is determined, and other aspects (like duplicative work, clerical work (including identifying and determining how do they distinguish between clerical and legal), vague, redactions, block billing, inadequately documented), and excessiveness, among others, as well as considering the extent to which you might be able to raise an exclusionary challenge. Then, take a thorough deposition.

\textbf{E. Affidavit vs. Live Testimony (or Both)}

If you submit the attorneys’ fees issue to the court, affidavits are an efficient and cost-effective option, if done properly.

As stated many times, if you are the claimant, be sure to present evidence covering all of the \textit{Arthur Andersen} factors, prove up lodestar, provide evidence of segregated fees (even additional evidence
of the unrecoverable fee), and attach contemporaneous billing records (or a reasonable substitute, even if you have to reconstruct them). If you are defending the claim, provide a controverting affidavit not only critiquing the claimant’s fees, but also presenting affirmative proof.

However, even with affidavits, consider asking for a hearing to present additional information. For the claimant, this can provide an opportunity to flesh out your proof and fill in any gaps. Conversely, if defending, nothing is more persuasive than a strong cross-examination, which is virtually impossible when exchanging affidavits back and forth.

If you are defending a large attorneys’ fees claim, do you want a short, relatively superficial exchange or affidavits or do you need a thorough hearing on the issue. Will affidavits alone adequately explore the many issues that need to be raised and will they do so persuasively.

Finally, who is your judge and is he more likely to listen at a hearing or studiously read extensive written filings?

F. What to Ask For

The Pattern Jury Charge has four categories: through trial, appellate, petition for review, and merits briefing in the Texas Supreme Court. So, these four are clearly recoverable. However, some items slip through the cracks, like post-verdict motions and hearings, post-judgment motions and hearings, post-judgment discovery, and collection other than through a separate suit.

We would argue that post-verdict motions and hearings and post-judgment motions and hearings need to be projected and included in either your “through-trial” fees or your appellate fees. We think that it is fair to lump them in one place or the other. The point is to consider them, articulate them, designate them into whichever category you are placing them, and then explain yourself. With respect to post-verdict motions and hearings and post-judgment motions and hearings, if you did not adequately project how extensive they would be, consider asking the court for leave to supplement your application. The judge may be more hesitant to allow this if the fees were submitted to a jury, but, if you do not make a request and a record, you will invariably lose your right to seek them. (However, we were recently in a case remanded, in part on the attorneys’ fees issue, and the court allowed the plaintiff to supplement the record with additional post-verdict and appellate fees.)

However, we are not aware of case law in which post-judgment discovery and fees for collection are held to be recoverable in the underlying claim as opposed to a separate collection action. All

88 If a separate suit is filed to collect the judgment, then you can seek attorneys’ fees under Texas Civil Practice and Remedies Code § 31.002(e).

89 At least one case held that attorneys’ fees for collection of the judgment may not be recovered in the underlying action. See Mabon Ltd. v. Afri-Carib Enters., Inc., 29 S.W.3d 291, 302 (Tex. App.—Houston [14th Dist.] 2000), rev’d on other grounds, 29 S.W. 3d 291 (Tex. 2012) (reversing the amount attorneys’ fees expert testified would be required to collect the judgment). However, that case cited and relied on Robertson v. Robertson, 608 S.W.2d 245, 247 (Tex. Civ. App.—Eastlad 1980, no writ) for the proposition that there is no substantive law permitting an award of attorneys’ fees in a suit to collect on a judgment. Robertson predated § 31.002(e). So, one wonders whether Mabon correctly decided the issue.
of that being said, in a bench trial or submission of the issue to the court, you can ask for additional line items in the findings of fact and conclusions of law. In a recent bench trial, we persuaded the court to award fees for post-judgment discovery and collection efforts. These fees were not disputed on appeal. However, as separate findings of fact and conclusions of law, the appellate court could have easily struck just those line items and modified the judgment accordingly. Unless the trial court is willing to add lines to the PJC when submitting the issue to the jury, you may not wish to risk a remand for new trial if the appellate court finds these improper. However, if you are willing to try this even if the trial court does not offer additional lines on the verdict form, make your trial evidence clear as to how much you were seeking for post-judgment discovery and for collection and argue on appeal (possibly even as late as a motion for rehearing) only those amounts should struck and the judgment modified as in Mabon. Alternatively, offer remittitur for those amounts, which should cure the error, if any.

Be sure to support your appellate fees with a reasonable description of the work involved by discrete tasks (at least by categories), a reasonable estimation of unrecoverable work (possibly a percentage estimation on the segregation issue), and a reasonable projection of hours.

One final note, we have yet to request appellate attorneys’ fees that have actually covered the cost of an appeal. We have always well underestimated the amount of work. We hope to do better, but we always tell the fact finder that we inherently underestimate appellate fees.
A BILL TO BE ENTITLED
AN ACT
relating to an award of costs and attorney's fees in a motion to
dismiss for certain actions that have no basis in law or fact.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
SECTION 1. Section 30.021, Civil Practice and Remedies
Code, is amended to read as follows:
Sec. 30.021. AWARD OF ATTORNEY'S FEES IN RELATION TO
CERTAIN MOTIONS TO DISMISS. In a civil proceeding, on a trial
court's granting or denial, in whole or in part, of a motion to
dismiss filed under the rules adopted by the supreme court under
Section 22.004(g), Government Code, the court may award
costs and reasonable and necessary attorney's fees to the
prevailing party. This section does not apply to actions by or
against the state, other governmental entities, or public officials
acting in their official capacity or under color of law.

SECTION 2. The change in law made by this Act applies only
to a civil action commenced on or after the effective date of this
Act. A civil action commenced before the effective date of this Act
is governed by the law applicable to the action immediately before
the effective date of this Act, and that law is continued in effect
for that purpose.

SECTION 3. This Act takes effect September 1, 2019.
A BILL TO BE ENTITLED

AN ACT

relating to the award of attorney's fees in certain civil actions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 38.006, Civil Practice and Remedies Code, is repealed.

SECTION 2. The repeal of Section 38.006, Civil Practice and Remedies Code, by this Act applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2019.
A BILL TO BE ENTITLED
AN ACT
relating to recovery of attorney's fees in certain civil cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 38.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES. A person may recover reasonable attorney's fees from another person [an individual or corporation], in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;
(2) performed labor;
(3) furnished material;
(4) freight or express overcharges;
(5) lost or damaged freight or express;
(6) killed or injured stock;
(7) a sworn account; or
(8) an oral or written contract.

SECTION 2. The change in law made by this Act applies only to an award of attorney's fees in an action commenced on or after the effective date of this Act. An award of attorney's fees in an action commenced before the effective date of this Act is governed
by the law applicable to the award immediately before the effective
date of this Act, and that law is continued in effect for that
purpose.

SECTION 3. This Act takes effect September 1, 2019.
A BILL TO BE ENTITLED
AN ACT

relating to recovery of attorney's fees in certain civil cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 38.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES. A person may recover reasonable attorney's fees from an individual or an organization, as defined by Section 1.002, Business Organizations Code [corporation], in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;
(2) performed labor;
(3) furnished material;
(4) freight or express overcharges;
(5) lost or damaged freight or express;
(6) killed or injured stock;
(7) a sworn account; or
(8) an oral or written contract.

SECTION 2. The change in law made by this Act applies only to an award of attorney's fees in an action commenced on or after the effective date of this Act. An award of attorney's fees in an
action commenced before the effective date of this Act is governed by the law applicable to the award immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2019.
A BILL TO BE ENTITLED
AN ACT
relating to recovery of attorney's fees in certain civil cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 38.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES. (a) In this section, "organization" has the meaning assigned by Section 1.002, Business Organizations Code.

(b) A person may recover reasonable attorney's fees from an individual or a corporation or other organization, in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;
(2) performed labor;
(3) furnished material;
(4) freight or express overcharges;
(5) lost or damaged freight or express;
(6) killed or injured stock;
(7) a sworn account; or
(8) an oral or written contract.

SECTION 2. The change in law made by this Act applies only to an award of attorney's fees in an action commenced on or after the
effective date of this Act. An award of attorney's fees in an
action commenced before the effective date of this Act is governed
by the law applicable to the award immediately before the effective
date of this Act, and that law is continued in effect for that
purpose.

SECTION 3. This Act takes effect September 1, 2019.
APPENDIX B
2015 HOURLY RATE FACT SHEET

STATE BAR OF TEXAS
DEPARTMENT OF RESEARCH & ANALYSIS

2015 HOURLY FACT SHEET

Published August 2016
Analysis by Invariance Dynamics Consulting – Nils Greger Olsson, PhD

P.O. Box 12487, Austin, TX 78711 (800) 204-2222, ext. 1724 or (512) 427-1724 research@texasbar.com
Introduction

This hourly rate report is published periodically about the economics of law practice in Texas. To make such information available to attorneys, the State Bar’s Department of Research and Analysis conducted the Texas Attorney Survey – Status 2015 on March 21, 2016. A goal of the survey was to obtain information on hourly rates charged in 2015 by Texas attorneys.

This report presents the data collected on the hourly rates of 4,260 licensed and practicing, full-time private practitioners who provided hourly rate information for the calendar year 2015. The report provides detailed breakdowns of hourly rates by sex, race, ethnicity, age, law firm size, years of experience, area of practice, and region of the state. A comparison to 2013 hourly rates is also provided for select demographics.

The questionnaire was emailed on March 21, 2016, to all active State Bar of Texas attorneys who have not opted out of taking surveys (N = 94,150). The survey’s response rate was 12.5 percent, with a total of 11,793 attorneys responding to at least a portion of the survey. A more detailed description of the methodology and a copy of the questionnaire are included at the end of this report (Appendix A).

This report on hourly rates displays the median hourly rates by category. The median hourly rate is the preferred measure of average hourly rates, rather than the mean, because it more accurately represents the typical rates. Rates are only reported on categories with 6 or more responses.
2015 and 2013 Overall Hourly Rates\(^1\): Distribution Statistics

This *distribution statistics* table on the right shows the following statistics of 2015 hourly rates:

i. The **mean (average)**: of reported hourly rates.

ii. The **75\(^{th}\) percentile**: 75 percent of attorneys charge at or less.

iii. The **median (50\(^{th}\) percentile)**: the hourly rate charged at the midpoint of a rank ordering of attorneys’ rates (50 percent of attorneys charge the median or less).

iv. The **25\(^{th}\) percentile**, the rate that 25 percent of attorneys charge at or less than.

When possible, the 2013 hourly rate medians are shown for the comparison.

\(^1\)If an attorney’s hourly rate varied by area of practice, a simple average for that attorney was calculated.
Hourly Rate Summary Findings

Below are summary findings from the 2015 survey. Articles will be published in the *Texas Bar Journal* to provide detailed information on notable findings.

All hourly rate information provided in this report is for full-time private practitioners only.

Hourly Rates by Demographic Category

- The median hourly rate reported for all full-time private practitioners increased by 7.4 percent ($242 to $260) from 2013 to 2015.
- The median hourly rate reported for women attorneys increased by 9.6 percent ($228 to $250) from 2013 to 2015. This compares to a 11.3 percent ($247 to $275) increase for male attorneys.
- The median hourly rate reported for racial minority attorneys increased by 14.7 percent ($218 to $250) from 2013 to 2015. This compares to a 6.1 percent increase ($245 to $260) for white attorneys.
- There is a direct relationship between median hourly rates and years of experience, age, and firm size. Information on median hourly rates reported in 2015 for these categories include:
  - Years of experience: Rates increase as attorneys obtain more experience. In 2015, rates ranged from $200 for attorneys who had 2 or less years of experience to $300 for attorneys who had more than 25 years of experience.
  - Age: Rates increase as attorneys age. In 2015, rates ranged from $180 for attorneys who were 21 to 25 years of age to $300 for attorneys who were more than 65 years of age.
  - Firm size: Rates increase as firm sizes increase. In 2015, rates ranged from $250 for attorneys who worked as solo practitioners to $425 for attorneys who were in firms with more than 400 attorneys.
- Detailed information on hourly rates reported by practice area can be found on pages 6-7, and 9-11.

Hourly Rates by Geographic Region

- Overall median hourly rate findings by geographic region include:
  - All metropolitan regions: Rates for attorneys in metropolitan regions increased by 8.2 percent ($243 to $263) from 2013 to 2015.
  - Non-metropolitan areas: Rates for attorneys in non-metropolitan areas increased by 20.6 percent ($199 to $240) from 2013 to 2015.
  - Out of state/country: Rates for attorneys out of state/country increased by 9.7 percent ($269 to $295) from 2013 to 2015.
- Detailed information on hourly rates by geographic region can be found on pages 8-13.
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- Age ......................................................................................................................... 4
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Median Hourly Rates by Demographic Category

*Note: If an attorney’s hourly rate varied by area of practice, a simple average was calculated.*
# Hourly Rates by Demographic Category

## 2013 and 2015 Median Hourly Rate by Sex, Race, and Ethnicity

<table>
<thead>
<tr>
<th>Demographic Category</th>
<th>Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
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<td>2013</td>
<td>2015</td>
</tr>
<tr>
<td>All Full-Time Private Practitioners</td>
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<td></td>
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<td>(N = 4,951)</td>
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<td>(N = 3,958)</td>
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<td>All Racial Minorities</td>
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<td>(For 2013, this included Hispanic or Latino)</td>
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<td>(N = 732)</td>
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</tr>
<tr>
<td>(N = 132)</td>
<td>(N = 110)</td>
<td></td>
</tr>
<tr>
<td>American Indian or Alaska Native</td>
<td>$200</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 14)</td>
<td>(N = 24)</td>
<td></td>
</tr>
<tr>
<td>Asian</td>
<td>$230</td>
<td>$250</td>
</tr>
<tr>
<td>(above was &quot;Asian/Pacific Islander in 2013)</td>
<td>(N = 107)</td>
<td>(N = 89)</td>
</tr>
<tr>
<td>Native Hawaiian or Other Pacific Islander</td>
<td>N/A</td>
<td>~</td>
</tr>
<tr>
<td>Two or More Races</td>
<td>$233</td>
<td>$264</td>
</tr>
<tr>
<td>(N = 65)</td>
<td>(N = 74)</td>
<td></td>
</tr>
<tr>
<td>Other Race</td>
<td>$238</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 53)</td>
<td>(N = 70)</td>
<td></td>
</tr>
<tr>
<td>Ethnicity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic or Latino</td>
<td>$203</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 361)</td>
<td>(N = 376)</td>
<td></td>
</tr>
<tr>
<td>Not Hispanic or Latino</td>
<td>N/A</td>
<td>$265</td>
</tr>
<tr>
<td>N/A</td>
<td>(N = 3,721)</td>
<td></td>
</tr>
</tbody>
</table>

If multiple rates provided, by practice area, they were averaged for overall hourly rate. Rates are reported only for groups with six or more observations. Otherwise the tilde is shown (~).
## Hourly Rates by Demographic Category

### 2013 and 2015 Median Hourly Rate by Years of Experience

<table>
<thead>
<tr>
<th>Years of Experience</th>
<th>Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2013</td>
<td>2015</td>
</tr>
<tr>
<td>2 or less years</td>
<td>$185 (N = 590)</td>
<td>$200 (N = 475)</td>
</tr>
<tr>
<td>3 to 6 years</td>
<td>$218 (N = 790)</td>
<td>$250 (N = 759)</td>
</tr>
<tr>
<td>7 to 10 years</td>
<td>$239 (N = 533)</td>
<td>$250 (N = 483)</td>
</tr>
<tr>
<td>11 to 15 years</td>
<td>$245 (N = 498)</td>
<td>$258 (N = 483)</td>
</tr>
<tr>
<td>16 to 20 years</td>
<td>$261 (N = 437)</td>
<td>$300 (N = 382)</td>
</tr>
<tr>
<td>21 to 25 years</td>
<td>$264 (N = 504)</td>
<td>$300 (N = 383)</td>
</tr>
<tr>
<td>Over 25 years</td>
<td>$281 (N = 1,399)</td>
<td>$300 (N = 1,194)</td>
</tr>
</tbody>
</table>

Note: Years of experience based on year first licensed in any jurisdiction.
### Hourly Rates by Demographic Category

**2013 and 2015 Median Hourly Rate by Age**

<table>
<thead>
<tr>
<th>Age</th>
<th>Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2013</td>
<td>2015</td>
</tr>
<tr>
<td>21 to 25 years</td>
<td>$150</td>
<td>$180</td>
</tr>
<tr>
<td>(N = 26)</td>
<td></td>
<td>(N = 49)</td>
</tr>
<tr>
<td>26 to 30 years</td>
<td>$192</td>
<td>$200</td>
</tr>
<tr>
<td>(N = 624)</td>
<td></td>
<td>(N = 567)</td>
</tr>
<tr>
<td>31 to 35 years</td>
<td>$227</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 686)</td>
<td></td>
<td>(N = 672)</td>
</tr>
<tr>
<td>36 to 40 years</td>
<td>$237</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 512)</td>
<td></td>
<td>(N = 466)</td>
</tr>
<tr>
<td>41 to 45 years</td>
<td>$240</td>
<td>$254</td>
</tr>
<tr>
<td>(N = 499)</td>
<td></td>
<td>(N = 444)</td>
</tr>
<tr>
<td>46 to 50 years</td>
<td>$262</td>
<td>$290</td>
</tr>
<tr>
<td>(N = 500)</td>
<td></td>
<td>(N = 398)</td>
</tr>
<tr>
<td>51 to 55 years</td>
<td>$268</td>
<td>$275</td>
</tr>
<tr>
<td>(N = 530)</td>
<td></td>
<td>(N = 426)</td>
</tr>
<tr>
<td>56 to 60 years</td>
<td>$269</td>
<td>$300</td>
</tr>
<tr>
<td>(N = 546)</td>
<td></td>
<td>(N = 428)</td>
</tr>
<tr>
<td>61 to 65 years</td>
<td>$270</td>
<td>$300</td>
</tr>
<tr>
<td>(N = 397)</td>
<td></td>
<td>(N = 367)</td>
</tr>
<tr>
<td>More than 65 years</td>
<td>$279</td>
<td>$300</td>
</tr>
<tr>
<td>(N = 401)</td>
<td></td>
<td>(N = 325)</td>
</tr>
</tbody>
</table>
# 2015 HOURLY RATE FACT SHEET

## Hourly Rates by Demographic Category

### 2013 and 2015 Median Hourly Rates by Firm Size

<table>
<thead>
<tr>
<th>Firm Size</th>
<th>Median Hourly Rates 2013</th>
<th>Median Hourly Rates 2015</th>
<th>Change from 2013 to 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Difference</td>
</tr>
<tr>
<td>Solo Practitioners</td>
<td>$230 (N = 1,539)</td>
<td>$250 (N = 1,101)</td>
<td>$20</td>
</tr>
<tr>
<td>2 to 5 attorneys</td>
<td>$237 (N = 1,336)</td>
<td>$250 (N = 1,101)</td>
<td>$13</td>
</tr>
<tr>
<td>6 to 10 attorneys</td>
<td>$236 (N = 488)</td>
<td>$250 (N = 511)</td>
<td>$14</td>
</tr>
<tr>
<td>11 to 24 attorneys</td>
<td>$231 (N = 468)</td>
<td>$250 (N = 437)</td>
<td>$19</td>
</tr>
<tr>
<td>25 to 40 attorneys</td>
<td>$236 (N = 271)</td>
<td>$250 (N = 264)</td>
<td>$14</td>
</tr>
<tr>
<td>41 to 60 attorneys</td>
<td>$248 (N = 114)</td>
<td>$280 (N = 123)</td>
<td>$32</td>
</tr>
<tr>
<td>61 to 100 attorneys</td>
<td>$266 (N = 129)</td>
<td>$257 (N = 84)</td>
<td>-$9</td>
</tr>
<tr>
<td>101 to 200 attorneys</td>
<td>$304 (N = 117)</td>
<td>$333 (N = 93)</td>
<td>$29</td>
</tr>
<tr>
<td>201 to 400</td>
<td>$378 (N = 117)</td>
<td>$359 (N = 137)</td>
<td>-$19</td>
</tr>
<tr>
<td>More than 400 attorneys</td>
<td>$452 (N = 347)</td>
<td>$425 (N = 318)</td>
<td>-$27</td>
</tr>
</tbody>
</table>
### Hourly Rates by Demographic Category

**2013 and 2015 Median Hourly Rates by Practice Area**

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>2013 Median Hourly Rates</th>
<th>2015 Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative and Public</td>
<td>$243</td>
<td>$271</td>
<td>$28</td>
</tr>
<tr>
<td>ADR</td>
<td>$278</td>
<td>$300</td>
<td>$22</td>
</tr>
<tr>
<td>Antitrust</td>
<td>$463</td>
<td>$485</td>
<td>$22</td>
</tr>
<tr>
<td>Appellate</td>
<td>$258</td>
<td>$295</td>
<td>$37</td>
</tr>
<tr>
<td>Aviation</td>
<td>$230</td>
<td>$310</td>
<td>$80</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>$259</td>
<td>$300</td>
<td>$41</td>
</tr>
<tr>
<td>Business</td>
<td>$248</td>
<td>$285</td>
<td>$37</td>
</tr>
<tr>
<td>Construction</td>
<td>$235</td>
<td>$250</td>
<td>$15</td>
</tr>
<tr>
<td>Consumer</td>
<td>$233</td>
<td>$243</td>
<td>$10</td>
</tr>
<tr>
<td>Creditor-Debtor</td>
<td>$211</td>
<td>$250</td>
<td>$39</td>
</tr>
<tr>
<td>Criminal</td>
<td>$190</td>
<td>$200</td>
<td>$10</td>
</tr>
<tr>
<td>Elder Law</td>
<td>$228</td>
<td>$250</td>
<td>$22</td>
</tr>
<tr>
<td>Entertainment</td>
<td>$307</td>
<td>$300</td>
<td>-$7</td>
</tr>
<tr>
<td>Environmental</td>
<td>$321</td>
<td>$308</td>
<td>-$14</td>
</tr>
<tr>
<td>Ethics-Legal Malpractice</td>
<td>$279</td>
<td>$273</td>
<td>-$7</td>
</tr>
<tr>
<td>Family</td>
<td>$227</td>
<td>$250</td>
<td>$23</td>
</tr>
<tr>
<td>Government/Administrative</td>
<td>$196</td>
<td>$225</td>
<td>$29</td>
</tr>
<tr>
<td>Health Care</td>
<td>$247</td>
<td>$255</td>
<td>$8</td>
</tr>
<tr>
<td>Immigration</td>
<td>$196</td>
<td>$270</td>
<td>$74</td>
</tr>
</tbody>
</table>

**Note:** Attorneys could report working in more than one practice area. For example, if an attorney reported working in both family law and criminal law they were counted in both.
## Hourly Rates by Demographic Category

### 2013 and 2015 Median Hourly Rates by Practice Area (Continued)

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2013</td>
<td>2015</td>
<td>Difference</td>
</tr>
<tr>
<td>Insurance</td>
<td>$183 (N = 269)</td>
<td>$195 (N = 271)</td>
<td>$12</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>$331 (N = 267)</td>
<td>$365 (N = 208)</td>
<td>$34</td>
</tr>
<tr>
<td>International</td>
<td>$350 (N = 36)</td>
<td>$385 (N = 31)</td>
<td>$35</td>
</tr>
<tr>
<td>Juvenile</td>
<td>$147 (N = 47)</td>
<td>$100 (N = 27)</td>
<td>-$47</td>
</tr>
<tr>
<td>Labor-Employment</td>
<td>$256 (N = 335)</td>
<td>$278 (N = 282)</td>
<td>$22</td>
</tr>
<tr>
<td>Law Office Management</td>
<td>$241 (N = 15)</td>
<td>~</td>
<td>N/A</td>
</tr>
<tr>
<td>Litigation: Commercial</td>
<td>$265 (N = 1,299)</td>
<td>$283 (N = 1209)</td>
<td>$18</td>
</tr>
<tr>
<td>Litigation: Personal Injury</td>
<td>$189 (N = 599)</td>
<td>$185 (N = 431)</td>
<td>-$4</td>
</tr>
<tr>
<td>Military</td>
<td>~</td>
<td>~</td>
<td>N/A</td>
</tr>
<tr>
<td>Oil &amp; Gas</td>
<td>$240 (N = 350)</td>
<td>$255 (N = 302)</td>
<td>$15</td>
</tr>
<tr>
<td>Other</td>
<td>$237 (N = 265)</td>
<td>$260 (N = 183)</td>
<td>$23</td>
</tr>
<tr>
<td>Public Utility Law</td>
<td>$259 (N = 44)</td>
<td>$308 (N = 30)</td>
<td>$49</td>
</tr>
<tr>
<td>Real Estate</td>
<td>$237 (N = 731)</td>
<td>$250 (N = 612)</td>
<td>$13</td>
</tr>
<tr>
<td>School Law</td>
<td>$208 (N = 56)</td>
<td>$225 (N = 48)</td>
<td>$17</td>
</tr>
<tr>
<td>Securities Law</td>
<td>$338 (N = 83)</td>
<td>$385 (N = 78)</td>
<td>$47</td>
</tr>
<tr>
<td>Social Security Law</td>
<td>$194 (N = 12)</td>
<td>~</td>
<td>N/A</td>
</tr>
<tr>
<td>Taxation</td>
<td>$292 (N = 151)</td>
<td>$350 (N = 172)</td>
<td>$58</td>
</tr>
<tr>
<td>Technology</td>
<td>$290 (N = 30)</td>
<td>$375 (N = 25)</td>
<td>$85</td>
</tr>
<tr>
<td>Wills-Trusts-Probate</td>
<td>$232 (N = 867)</td>
<td>$250 (N = 602)</td>
<td>$18</td>
</tr>
</tbody>
</table>

Note: Attorneys could report working in more than one practice area. Rates are reported only for groups with six or more observations. Otherwise the tilde is shown (~).
# Hourly Rates by Geographic Region

## 2013 and 2015 Median Hourly Rates by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>Median Hourly Rates</th>
<th>Change from 2013 to 2015</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2013</td>
<td>2015</td>
<td>Difference</td>
</tr>
<tr>
<td>All Metropolitan Regions</td>
<td>$243 (N = 4,234)</td>
<td>$263 (N = 3,644)</td>
<td>$20</td>
</tr>
<tr>
<td>Houston-The Woodlands-Sugarland MSA</td>
<td>$249 (N = 1,257)</td>
<td>$275 (N = 1,134)</td>
<td>$26</td>
</tr>
<tr>
<td>Dallas-Fort Worth-Arlington MSA</td>
<td>$249 (N = 1,368)</td>
<td>$275 (N = 1,144)</td>
<td>$26</td>
</tr>
<tr>
<td>Austin-Round Rock MSA</td>
<td>$259 (N = 574)</td>
<td>$300 (N = 449)</td>
<td>$41</td>
</tr>
<tr>
<td>San Antonio-New Braunfels MSA</td>
<td>$225 (N = 358)</td>
<td>$250 (N = 341)</td>
<td>$25</td>
</tr>
<tr>
<td>El Paso MSA</td>
<td>$203 (N = 61)</td>
<td>$200 (N = 62)</td>
<td>-$3</td>
</tr>
<tr>
<td>Corpus Christi MSA</td>
<td>$229 (N = 59)</td>
<td>$250 (N = 50)</td>
<td>$21</td>
</tr>
<tr>
<td>Beaumont-Port Arthur MSA</td>
<td>$218 (N = 46)</td>
<td>$232 (N = 42)</td>
<td>$14</td>
</tr>
<tr>
<td>Central Texas MSAs</td>
<td>$199 (N = 55)</td>
<td>$225 (N = 51)</td>
<td>$26</td>
</tr>
<tr>
<td>East &amp; NE Texas MSAs</td>
<td>$225 (N = 162)</td>
<td>$250 (N = 139)</td>
<td>$25</td>
</tr>
<tr>
<td>South Texas MSAs</td>
<td>$198 (N = 97)</td>
<td>$225 (N = 79)</td>
<td>$27</td>
</tr>
<tr>
<td>West Texas MSAs</td>
<td>$224 (N = 197)</td>
<td>$225 (N = 153)</td>
<td>$1</td>
</tr>
<tr>
<td>Non-Metro Areas</td>
<td>$199 (N = 191)</td>
<td>$240 (N = 154)</td>
<td>$41</td>
</tr>
<tr>
<td>Out of State/Country</td>
<td>$269 (N = 251)</td>
<td>$295 (N = 278)</td>
<td>$26</td>
</tr>
</tbody>
</table>
## Hourly Rates by Practice Area by Geographic Region

### 2015 Median Hourly Rates

<table>
<thead>
<tr>
<th>Practice Area by Region</th>
<th>2015 Median Hourly Rates by Practice Area by Region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houston-The Woodlands - Sugarland MSA</td>
<td>$300</td>
</tr>
<tr>
<td>(N = 15)</td>
<td>(N = 13)</td>
</tr>
<tr>
<td>ADR</td>
<td>$350</td>
</tr>
<tr>
<td>(N = 8)</td>
<td>(N = 8)</td>
</tr>
<tr>
<td>Antitrust</td>
<td>~</td>
</tr>
<tr>
<td>(N = 45)</td>
<td>(N = 46)</td>
</tr>
<tr>
<td>Appellate</td>
<td>$325</td>
</tr>
<tr>
<td>(N = 31)</td>
<td>(N = 39)</td>
</tr>
<tr>
<td>Aviation</td>
<td>~</td>
</tr>
<tr>
<td>(N = 59)</td>
<td>(N = 71)</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>$300</td>
</tr>
<tr>
<td>(N = 31)</td>
<td>(N = 39)</td>
</tr>
<tr>
<td>Business</td>
<td>$300</td>
</tr>
<tr>
<td>Construction</td>
<td>$240</td>
</tr>
<tr>
<td>(N = 59)</td>
<td>(N = 71)</td>
</tr>
<tr>
<td>Consumer</td>
<td>$200</td>
</tr>
<tr>
<td>(N = 20)</td>
<td>(N = 25)</td>
</tr>
<tr>
<td>Creditor-Debtor</td>
<td>$250</td>
</tr>
<tr>
<td>(N = 45)</td>
<td>(N = 45)</td>
</tr>
<tr>
<td>Criminal</td>
<td>$200</td>
</tr>
<tr>
<td>(N = 27)</td>
<td>(N = 30)</td>
</tr>
<tr>
<td>Elder Law</td>
<td>$233</td>
</tr>
<tr>
<td>(N = 8)</td>
<td>(N = 17)</td>
</tr>
<tr>
<td>Entertainment</td>
<td>~</td>
</tr>
<tr>
<td>(N = 7)</td>
<td></td>
</tr>
</tbody>
</table>

Note: Attorneys could report working in more than one practice area. Rates are reported only for groups with six or more observations. Otherwise a tilde is shown (~).
## 2015 HOURLY RATE FACT SHEET

### Hourly Rates by Practice Area by Geographic Region (continued)

#### 2015 Median Hourly Rates

<table>
<thead>
<tr>
<th>Practice Area by Region</th>
<th>Houston-The Woodlands -Sugarland MSA</th>
<th>Dallas-Fort Worth-Arlington MSA</th>
<th>Austin-Round Rock MSA</th>
<th>San Antonio-New Braunfels MSA</th>
<th>El Paso MSA</th>
<th>Corpus Christi MSA</th>
<th>Beaumont-Port Arthur MSA</th>
<th>Central Texas MSAs</th>
<th>East &amp; NE Texas MSAs</th>
<th>South Texas MSAs</th>
<th>West Texas MSAs</th>
<th>Non-Metro Areas</th>
<th>Out of State/Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental</td>
<td>$388 ($N = 12)</td>
<td>$418 ($N = 6)</td>
<td>$300 ($N = 16)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$330 ($N = 12)</td>
</tr>
<tr>
<td>Ethics-Legal Malpractice</td>
<td>$350 ($N = 7)</td>
<td>$240 ($N = 12)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$250 ($N = 23)</td>
</tr>
<tr>
<td>Family</td>
<td>$260 ($N = 219)</td>
<td>$250 ($N = 242)</td>
<td>$268 ($N = 82)</td>
<td>$225 ($N = 98)</td>
<td>$213 ($N = 10)</td>
<td>$213 ($N = 8)</td>
<td>$200 ($N = 26)</td>
<td>$219 ($N = 7)</td>
<td>$250 ($N = 47)</td>
<td>$250 ($N = 17)</td>
<td>$250 ($N = 38)</td>
<td>$250 ($N = 61)</td>
<td>$250 ($N = 23)</td>
</tr>
<tr>
<td>Government/Administrative</td>
<td>$250 ($N = 24)</td>
<td>$213 ($N = 24)</td>
<td>$263 ($N = 6)</td>
<td>$238 ($N = 24)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$200 ($N = 10)</td>
<td>~</td>
<td>~</td>
<td>$225 ($N = 10)</td>
<td>$225 ($N = 8)</td>
</tr>
<tr>
<td>Health Care</td>
<td>$200 ($N = 17)</td>
<td>$240 ($N = 32)</td>
<td>$340 ($N = 16)</td>
<td>$180 ($N = 15)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$300 ($N = 10)</td>
</tr>
<tr>
<td>Immigration</td>
<td>$295 ($N = 6)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
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<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
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</tr>
<tr>
<td>Insurance</td>
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<td>$185 ($N = 61)</td>
<td>$213 ($N = 24)</td>
<td>$175 ($N = 20)</td>
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<td>~</td>
<td>~</td>
<td>$200 ($N = 7)</td>
<td>~</td>
<td>$190 ($N = 7)</td>
<td>~</td>
<td>$185 ($N = 27)</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>$345 ($N = 48)</td>
<td>$370 ($N = 68)</td>
<td>$400 ($N = 39)</td>
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<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$350 ($N = 9)</td>
<td>~</td>
<td>~</td>
<td>$400 ($N = 25)</td>
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</tr>
<tr>
<td>International</td>
<td>$435 ($N = 13)</td>
<td>$313 ($N = 6)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$525 ($N = 7)</td>
<td></td>
</tr>
<tr>
<td>Juvenile</td>
<td>~ $100 ($N = 8)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
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<td>~</td>
<td>~</td>
<td>$100 ($N = 7)</td>
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</tr>
<tr>
<td>Labor-Employment</td>
<td>$285 ($N = 85)</td>
<td>$280 ($N = 81)</td>
<td>$300 ($N = 33)</td>
<td>$258 ($N = 24)</td>
<td>$205 ($N = 10)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$240 ($N = 9)</td>
<td>$225 ($N = 10)</td>
<td>~</td>
<td>~</td>
<td>$300 ($N = 21)</td>
</tr>
<tr>
<td>Law Office Management</td>
<td>~ $300 ($N = 367)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Litigation: Commercial</td>
<td>$295 ($N = 350)</td>
<td>$300 ($N = 101)</td>
<td>$300 ($N = 83)</td>
<td>$263 ($N = 17)</td>
<td>$275 ($N = 13)</td>
<td>$250 ($N = 15)</td>
<td>$250 ($N = 13)</td>
<td>$250 ($N = 38)</td>
<td>$275 ($N = 22)</td>
<td>$250 ($N = 43)</td>
<td>$250 ($N = 31)</td>
<td>$320 ($N = 77)</td>
<td></td>
</tr>
</tbody>
</table>

Note: Attorneys could report working in more than one practice area. Rates are reported only for groups with six or more observations. Otherwise a tilde is shown (~).
### Hourly Rates by Practice Area by Geographic Region (continued)

#### 2015 Median Hourly Rates

<table>
<thead>
<tr>
<th>Practice Area by Region</th>
<th>2015 Median Hourly Rates by Practice Area by Region (Continued)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houston-The Woodlands-Sugarland MSA</td>
<td>$200 (N = 135)</td>
</tr>
<tr>
<td>Dallas-Fort Worth-Arlington MSA</td>
<td>$185 (N = 104)</td>
</tr>
<tr>
<td>Austin-Round Rock MSA</td>
<td>$200 (N = 20)</td>
</tr>
<tr>
<td>San Antonio-New Braunfels MSA</td>
<td>$175 (N = 42)</td>
</tr>
<tr>
<td>El Paso MSA</td>
<td>$160 (N = 13)</td>
</tr>
<tr>
<td>Corpus Christi MSA</td>
<td>$160 (N = 11)</td>
</tr>
<tr>
<td>Beaumont-Port Arthur MSA</td>
<td>$200 (N = 11)</td>
</tr>
<tr>
<td>Central Texas MSAs</td>
<td>~ (N = 9)</td>
</tr>
<tr>
<td>East &amp; NE Texas MSAs</td>
<td>$160 (N = 15)</td>
</tr>
<tr>
<td>South Texas MSAs</td>
<td>$175 (N = 17)</td>
</tr>
<tr>
<td>West Texas MSAs</td>
<td>$160 (N = 17)</td>
</tr>
<tr>
<td>Non-Metro Areas</td>
<td>~ (N = 29)</td>
</tr>
<tr>
<td>Out of State/Country</td>
<td>~</td>
</tr>
</tbody>
</table>

#### Litigation: Personal

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>Hourly Rate</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal</td>
<td>$200</td>
<td>135</td>
</tr>
<tr>
<td>Military</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Oil &amp; Gas</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Other</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Public Utility Law</td>
<td>~ $320 (N = 12)</td>
<td></td>
</tr>
<tr>
<td>Real Estate</td>
<td>$275</td>
<td>150</td>
</tr>
<tr>
<td>School Law</td>
<td>$250</td>
<td>9</td>
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<tr>
<td>Securities Law</td>
<td>$400</td>
<td>26</td>
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<tr>
<td>Social Security Law</td>
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<td>~</td>
</tr>
<tr>
<td>Taxation</td>
<td>$350</td>
<td>62</td>
</tr>
<tr>
<td>Technology</td>
<td>~ $350</td>
<td>9</td>
</tr>
<tr>
<td>Wills-Trusts-Probate</td>
<td>~ $275 (N = 147)</td>
<td></td>
</tr>
</tbody>
</table>

### Note:
Attorneys could report working in more than one practice area. Rates are reported only for groups with six or more observations. Otherwise a tilde is shown (~).
### Hourly Rates by Geographic Region by Years of Experience

**2015 Median Hourly Rates**

<table>
<thead>
<tr>
<th>Region by Years of Experience</th>
<th>2 or less years</th>
<th>3 to 6 years</th>
<th>7 to 10 years</th>
<th>11 to 15 years</th>
<th>16 to 20 years</th>
<th>21 to 25 years</th>
<th>Over 25 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houston-The Woodlands-Sugarland MSA</td>
<td>$213 (N = 145)</td>
<td>$250 (N = 211)</td>
<td>$265 (N = 125)</td>
<td>$257 (N = 130)</td>
<td>$300 (N = 92)</td>
<td>$300 (N = 103)</td>
<td>$300 (N = 322)</td>
</tr>
<tr>
<td>Dallas-Fort Worth-Arlington MSA</td>
<td>$217 (N = 155)</td>
<td>$250 (N = 210)</td>
<td>$265 (N = 161)</td>
<td>$300 (N = 113)</td>
<td>$300 (N = 99)</td>
<td>$300 (N = 112)</td>
<td>$350 (N = 292)</td>
</tr>
<tr>
<td>Austin-Round Rock MSA</td>
<td>$225 (N = 44)</td>
<td>$250 (N = 89)</td>
<td>$300 (N = 52)</td>
<td>$300 (N = 65)</td>
<td>$308 (N = 46)</td>
<td>$350 (N = 41)</td>
<td>$306 (N = 112)</td>
</tr>
<tr>
<td>San Antonio-New Braunfels MSA</td>
<td>$200 (N = 52)</td>
<td>$200 (N = 68)</td>
<td>$250 (N = 39)</td>
<td>$250 (N = 40)</td>
<td>$284 (N = 32)</td>
<td>$288 (N = 14)</td>
<td>$300 (N = 96)</td>
</tr>
<tr>
<td>El Paso MSA</td>
<td>~</td>
<td>$175 (N = 9)</td>
<td>~</td>
<td>$233 (N = 6)</td>
<td>$225 (N = 12)</td>
<td>~</td>
<td>$275 (N = 21)</td>
</tr>
<tr>
<td>Corpus Christi MSA</td>
<td>$188 (N = 6)</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$269 (N = 24)</td>
</tr>
<tr>
<td>Beaumont-Port Arthur MSA</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>$250 (N = 6)</td>
</tr>
<tr>
<td>Central Texas MSAs</td>
<td>~</td>
<td>$214 (N = 14)</td>
<td>~</td>
<td>$215 (N = 9)</td>
<td>~</td>
<td>~</td>
<td>$259 (N = 19)</td>
</tr>
<tr>
<td>East &amp; NE Texas MSAs</td>
<td>$175 (N = 10)</td>
<td>$200 (N = 21)</td>
<td>$240 (N = 12)</td>
<td>$235 (N = 15)</td>
<td>$263 (N = 12)</td>
<td>$275 (N = 19)</td>
<td>$275 (N = 50)</td>
</tr>
<tr>
<td>South Texas MSAs</td>
<td>$160 (N = 6)</td>
<td>$185 (N = 7)</td>
<td>$225 (N = 13)</td>
<td>$200 (N = 6)</td>
<td>$238 (N = 14)</td>
<td>$231 (N = 14)</td>
<td>$250 (N = 28)</td>
</tr>
<tr>
<td>West Texas MSAs</td>
<td>$180 (N = 20)</td>
<td>$200 (N = 34)</td>
<td>$200 (N = 23)</td>
<td>$238 (N = 16)</td>
<td>$250 (N = 12)</td>
<td>$273 (N = 14)</td>
<td>$275 (N = 34)</td>
</tr>
<tr>
<td>Non-Metro Areas</td>
<td>$175 (N = 8)</td>
<td>$190 (N = 16)</td>
<td>$250 (N = 11)</td>
<td>$225 (N = 19)</td>
<td>$225 (N = 15)</td>
<td>~</td>
<td>$250 (N = 7)</td>
</tr>
<tr>
<td>Out of State/Country</td>
<td>$191 (N = 10)</td>
<td>$250 (N = 56)</td>
<td>$280 (N = 29)</td>
<td>$295 (N = 35)</td>
<td>$323 (N = 36)</td>
<td>$260 (N = 28)</td>
<td>$307 (N = 84)</td>
</tr>
</tbody>
</table>

Note: Attorneys could report working in more than one practice area. Rates are reported only for groups with six or more observations. Otherwise a tilde is shown (~).
## Hourly Rates by Geographic Region by Firm Size

### 2015 Median Hourly Rates

<table>
<thead>
<tr>
<th>Firm Size by Region</th>
<th>Solo Practitioners</th>
<th>2 to 5 attorneys</th>
<th>6 to 10 attorneys</th>
<th>11 to 24 attorneys</th>
<th>25 to 40 attorneys</th>
<th>41 to 60 attorneys</th>
<th>61 to 100 attorneys</th>
<th>101 to 200 attorneys</th>
<th>201 to 400</th>
<th>Over 400</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houston-The Woodlands-Sugarland MSA</td>
<td>$250</td>
<td>$250</td>
<td>$250</td>
<td>$270</td>
<td>$250</td>
<td>$253</td>
<td>$246</td>
<td>$350</td>
<td>$354</td>
<td>$450</td>
</tr>
<tr>
<td>Dallas-Fort Worth-Arlington MSA</td>
<td>$275</td>
<td>$270</td>
<td>$250</td>
<td>$228</td>
<td>$250</td>
<td>$335</td>
<td>$295</td>
<td>$360</td>
<td>$345</td>
<td>$392</td>
</tr>
<tr>
<td>Austin-Round Rock MSA</td>
<td>$268</td>
<td>$297</td>
<td>$300</td>
<td>$295</td>
<td>$250</td>
<td>$285</td>
<td>$250</td>
<td>$305</td>
<td>$408</td>
<td>$345</td>
</tr>
<tr>
<td>San Antonio-New Braunfels MSA</td>
<td>$250</td>
<td>$225</td>
<td>$216</td>
<td>$215</td>
<td>$210</td>
<td>$263</td>
<td>~</td>
<td>~</td>
<td>$293</td>
<td>$421</td>
</tr>
<tr>
<td>El Paso MSA</td>
<td>$250</td>
<td>$200</td>
<td>~</td>
<td>$171</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Corpus Christi MSA</td>
<td>$250</td>
<td>$225</td>
<td>$208</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Beaumont-Port Arthur MSA</td>
<td>$230</td>
<td>$225</td>
<td>$264</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Central Texas MSAs</td>
<td>$213</td>
<td>$200</td>
<td>~</td>
<td>$225</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>East &amp; NE Texas MSAs</td>
<td>$250</td>
<td>$250</td>
<td>$250</td>
<td>$248</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>South Texas MSAs</td>
<td>$225</td>
<td>$230</td>
<td>$188</td>
<td>$200</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>West Texas MSAs</td>
<td>$225</td>
<td>$200</td>
<td>$224</td>
<td>$209</td>
<td>$241</td>
<td>$205</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Non-Metro Areas</td>
<td>$200</td>
<td>$250</td>
<td>$250</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
<td>~</td>
</tr>
<tr>
<td>Out of State/Country</td>
<td>$256</td>
<td>$275</td>
<td>$225</td>
<td>$288</td>
<td>$250</td>
<td>$308</td>
<td>$270</td>
<td>$308</td>
<td>$368</td>
<td>$465</td>
</tr>
</tbody>
</table>

Rates are reported only for groups with six or more observations. Otherwise a tilde is shown (~).
APPENDIX

Method

Data Collection

Attorney hourly rate information was collected in the Texas Attorney Survey – Status 2015. The questionnaire (Appendix A) was emailed on March 21, 2016, to 94,150 active attorneys licensed by the State Bar of Texas, maintaining active membership in the State Bar of Texas, and who did not opt out of receiving survey mailings.

The survey’s results are presented in part by geographic region, which is broken down into 13 economic areas. The metropolitan areas (Metropolitan Statistical Areas or MSAs) were defined by the Federal Office of Management and Budget.

Response Rate

The cutoff date of the survey was April 18, 2016. As of the deadline there were 11,793 who completed the questionnaire, for an overall response rate of 12.5 percent. Response rates for each region are shown in the table below. Information below is on respondents who provided information on the county they practiced in.

<table>
<thead>
<tr>
<th>Region</th>
<th>Active State Bar of Texas Members</th>
<th>% of State Bar Membership</th>
<th>SBOT Survey Respondents</th>
<th>% of Respondents</th>
<th>Response Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houston-The Woodlands-Sugarland MSA</td>
<td>28,224</td>
<td>28.6%</td>
<td>2,711</td>
<td>29.1%</td>
<td>9.6%</td>
</tr>
<tr>
<td>Dallas-Fort Worth-Arlington MSA</td>
<td>26,853</td>
<td>27.2%</td>
<td>2,704</td>
<td>29.0%</td>
<td>10.1%</td>
</tr>
<tr>
<td>Austin-Round Rock MSA</td>
<td>11,781</td>
<td>11.9%</td>
<td>1,411</td>
<td>15.1%</td>
<td>12.0%</td>
</tr>
<tr>
<td>San Antonio-New Braunfels MSA</td>
<td>6,754</td>
<td>6.8%</td>
<td>799</td>
<td>8.6%</td>
<td>11.8%</td>
</tr>
<tr>
<td>El Paso MSA</td>
<td>1,278</td>
<td>1.3%</td>
<td>161</td>
<td>1.7%</td>
<td>12.6%</td>
</tr>
<tr>
<td>Corpus Christi MSA</td>
<td>1,088</td>
<td>1.1%</td>
<td>134</td>
<td>1.4%</td>
<td>12.3%</td>
</tr>
<tr>
<td>Beaumont-Port Arthur MSA</td>
<td>795</td>
<td>0.8%</td>
<td>84</td>
<td>0.9%</td>
<td>10.6%</td>
</tr>
<tr>
<td>Central Texas MSAs</td>
<td>1,034</td>
<td>1.0%</td>
<td>140</td>
<td>1.5%</td>
<td>13.5%</td>
</tr>
<tr>
<td>East &amp; NE Texas MSAs</td>
<td>2,270</td>
<td>2.3%</td>
<td>284</td>
<td>3.0%</td>
<td>12.5%</td>
</tr>
<tr>
<td>South Texas MSAs</td>
<td>1,923</td>
<td>1.9%</td>
<td>219</td>
<td>2.3%</td>
<td>11.4%</td>
</tr>
<tr>
<td>West Texas MSAs</td>
<td>2,540</td>
<td>2.6%</td>
<td>332</td>
<td>3.6%</td>
<td>13.1%</td>
</tr>
<tr>
<td>Non-Metro Areas</td>
<td>3,417</td>
<td>3.5%</td>
<td>395</td>
<td>4.2%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Out of State/Country</td>
<td>10,714</td>
<td>10.9%</td>
<td>1,069</td>
<td>11.5%</td>
<td>10.0%</td>
</tr>
<tr>
<td>Total attorneys identified by work location</td>
<td>98,671</td>
<td>100.0%</td>
<td>10,443</td>
<td>100.0%</td>
<td>10.6%</td>
</tr>
</tbody>
</table>

*Numbers are based on attorneys who have reported the county they practiced in.
## Regions and Counties in Each Region

1 **Houston-The Woodlands-Sugar Land MSA**
- Austin
- Brazoria
- Chambers
- Fort Bend
- Galveston
- Harris
- Liberty
- Montgomery
- Waller

2 **Dallas-Fort Worth-Arlington MSA**
- Collin
- Dallas
- Denton
- Ellis
- Hood
- Hunt
- Johnson
- Kaufman
- Parker
- Rockwall
- Somervell
- Tarrant
- Wise

3 **Austin-Round Rock MSA**
- Bastrop
- Caldwell
- Hays
- Travis
- Williamson

4 **San Antonio-New Braunfels MSA**
- Atascosa
- Bandera
- Bexar
- Comal
- Guadalupe
- Kendall
- Medina
- Wilson

5 **El Paso MSA**
- El Paso
- Hudspeth

6 **Corpus Christi MSA**
- Aransas
- Nueces
- San Patricio

7 **Beaumont-Port Arthur MSA**
- Hardin
- Jefferson
- Newton
- Orange

8 **Waco MSA**
- McLennan
- Falls

9 **Killeen-Temple MSA**
- Bell
- Coryell
- Lampasas

10 **College Station-Bryan MSA**
- Brazos
- Burleson
- Robertson

11 **Longview MSA**
- Gregg
- Rusk
- Upshur

12 **Sherman-Denison MSA**
- Grayson

13 **Texarkana MSA**
- Bowie

14 **Tyler MSA**
- Smith

15 **Victoria MSA**
- Goliad
- Victoria

16 **Wichita Falls MSA**
- Archer
- Clay
- Wichita

### South Texas MSAs

17 **Brownsville-Harlingen MSA**
- Cameron

18 **Laredo MSA**
- Webb

19 **McAllen-Edinburg-Mission MSA**
- Hidalgo

### West Texas MSAs

20 **Abilene MSA**
- Callahan
- Jones
- Taylor

21 **Amarillo MSA**
- Armstrong
- Carson
- Oldham
- Potter
- Randall

22 **Lubbock MSA**
- Crosby
- Lubbock
- Lynn

23 **Midland MSA**
- Martin
- Midland

24 **Odessa MSA**
- Ector

25 **San Angelo MSA**
- Irion
- Tom Green
## 26 Non-Metropolitan Counties

|----------|----------|--------|--------|-----|--------|--------|--------|---------|---------|---------|-------|--------|--------|--------|------|-----|-------|-------|----------|--------|--------|------|--------|----------|----------|--------|------|-------|--------|--------|-------|-------|--------|------|-------|-------|--------|--------|-------|-------|
Dear Attorney,

The State Bar of Texas needs your help! **Complete the 2015 Texas Attorney Survey and you could win one of five prizes.** Two-hundred participants will each win $10 gift cards, two participants will win an Apple iPad Pro, and two will receive a pair of tickets to one of the following events:

- Dallas Cowboys Regular Season Home Game (game to be determined once schedule is available)
- Houston Texans Regular Season Home Game (game to be determined once schedule is available)
- NASCAR Chase for the Sprint Cup AAA Texas 500 Race
  - Suite tickets including food and beverage
  - VIP credentials into garage/pit area

The Texas Attorney Survey is conducted every other year to provide Texas attorneys with information about the economics of the practice of law. Reports generated from this survey will include detailed breakdowns of income, hourly rates, pro bono services, law school and career satisfaction, and State Bar of Texas Member Services. Results of this survey will be made available at texasbar.com/research.

This year the State Bar of Texas teamed up with Texas A&M University to include questions that touch on the economic and non-economic value of a law degree and career satisfaction. This information should help to provide prospective law students, law schools, and members of the bar with insight on how legal education affects an attorney’s career.

This survey is anonymous, and the process is secure. Your email address will be used for the drawings and will then be deleted and not associated with your responses.

Completion of the survey takes about four to eight minutes, depending on your occupation and pro bono experience. **Please complete the survey by 5 p.m. Monday, April 4, 2016.**

Your participation will help ensure you and other Texas attorneys have the most current economic information available.

If you have any questions please feel free to call us at (800) 204-2222, ext. 1724 or email us at research@texasbar.com. Thank you for your help.

Sincerely,
Cory Squires
State Bar of Texas Department of Research and Analysis
SURVEY QUESTIONS

INSTRUCTIONS
Each question can be answered by simply selecting a response or filling in a blank. These questions are for information related to calendar year 2015.

Completion of the survey should take, on average, 5 minutes.

Responses will be saved, you may close the survey and return later to complete if needed.

Please complete this questionnaire by 5 p.m. Monday, April 4, 2016.

Thank you for your participation.

PRIMARY OCCUPATION

1. For 2015, what was your primary occupation?
   ___ Private law practice    ___ Other law related
   ___ For-profit corporate/in-house counsel ___ Non-law related
   ___ Non-profit corporate/in-house counsel ___ Unemployed/Looking for work
   ___ Full-time judge ___ Unemployed/not looking for work
   ___ Other judicial branch ___ Retired/not working
   ___ Government attorney ___ Was not licensed to practice in 2015
   ___ Law faculty ___ Other___________________
   ___ Public interest lawyer

2. If applicable, what was your job title in 2015? __________________________

3. In calendar year 2015, did you work:
   ___Full-time ___Part-time ___By Contract___Not Applicable ___Other

4. What was your approximate gross personal income (including any bonus) during calendar year 2015?
   __________________________

5. If you received a bonus for 2015, what was it? ________________

6. How has your income changed in the last year?
   ___Increased significantly ___Increased moderately ___Remained steady ___Decreased moderately
   ___Decreased significantly

7. The State Bar of Texas defines pro bono as the provision of the following without an expectation of payment or at a substantially reduced fee:

   • legal services to the poor or to a charitable organization that addresses the needs of the poor,
   • services that improve the legal process or availability of legal services to the poor,
   • legislative, administrative or advocacy for the poor,
   • unsolicited, involuntary court appointments.

   The Bar’s pro bono policy does not define poor; however, it encourages attorneys to serve clients that would qualify for legal aid who live at or below 125% of the federal poverty guidelines ($14,850 for single person, $30,375 for family of 4).

Did you provide any of the above pro bono services in calendar year 2015? ___Yes ___No
8. For 2015, if you were in private law practice, how many attorneys, including yourself, worked in your firm? (Please include attorneys at all locations of your firm in the total.)

Number of attorneys (can be approximate): ________

9. For 2015, if you worked as a private law practitioner, please list the areas of practice that account for 25 percent or more of the time you spent practicing law, how you billed for your services, and the typical rate or fee (if applicable) you charged in each area. (For billing method please specify whether it was an hourly rate, flat fee, contingency fee, or other)

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>Billing Method</th>
<th>Rate</th>
<th>Percent of Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>__________________</td>
<td>_____________</td>
<td>________</td>
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<tr>
<td>__________________</td>
<td>_____________</td>
<td>________</td>
<td>________________</td>
</tr>
</tbody>
</table>

10. Please provide the following information on the average number of actual and billable hours worked per week, as an attorney in 2015:

___Actual hours worked per week
___Billable hours worked per week

11. Please specify your position in calendar year 2015 as a private practitioner:

___Sole Practitioner ___First-Year Associate ___Second-Year Associate ___Third-Year Associate ___Fourth-Year Associate
___Fifth-Year Associate ___Sixth-Year Associate ___Seventh-Year Associate ___Eighth-Year Associate ___Of Counsel
___Non-Equity Partner ___Equity Partner ___Managing Partner ___Other

12. What professional licenses or certificates, if any, do you have other than your law license?

___________________________________________________________________________________

13. Did you provide professional services other than legal services in 2015? ___Yes ___No

14. If yes, what other types of professional services did you provide?

___Real Estate Sales/Development/Management
___Insurance Sales
___Accounting
___Financial Planning
___Investment Advisor
___Registered Securities Representative
___Other _____________
If you answered “no” to question 7, please proceed to question 19.

Please take a moment to answer a few questions on the pro bono services you performed in 2015. This data will be used to highlight how Texas attorneys are doing their part to help low-income people in our state. Historically, Texas attorneys perform about 2.4 million hours of pro bono services each year.

15. **Did you provide any free legal services to the poor in 2015?** *(Do not include cases where your clients failed to pay you.)*

   ___Yes ___No

   If so, approximately how many total hours did you provide? ____________________________

   **Approximately how many hours were for:**
   
   Please note that these categories do not need to sum to the total hours provided.

   ___Civil Matters
   ___Criminal Matters
   ___Unsolicited Court Appointments
   ___Legal services to a charitable organization for the poor
   ___Legislative, administrative, or systems advocacy for the poor
   ___Legal services to simplify or improve quality of legal services to the poor

16. **Did you provide any legal services at a substantially reduced fee that benefited the poor in 2015?**

   *(Do not include cases where your clients failed to pay you.)*

   ___Yes ___No

   If so, approximately how many total hours did you provide? ____________________________

   **Approximately how many hours were for:**
   
   Please note that these categories do not need to sum to the total hours provided.

   ___Civil Matters
   ___Criminal Matters
   ___Unsolicited Court Appointments

17. **Did you pay actual out-of-pocket expenses related to pro bono or legal services to the poor in 2015?**

   ___Yes ___No

   If so, what was the approximate total amount of the out-of-pocket expenses that you paid in 2015?

   ________________________________________________________________

18. **Did you make any direct financial contributions related to legal services to the poor in 2015?**

   ___Yes ___No

   If so, what was the approximate total amount of the financial contribution you paid in 2015?

   ________________________________________________________________

19. If you have any comments or suggestions about pro bono services please provide them below:

   ________________________________________________________________

   ________________________________________________________________
**VOLUNTARY DEMOGRAPHICS**

The following voluntary demographic information is used to provide detailed economic trends and measure diversity in the practice of law in Texas. The State Bar of Texas follows the U.S. Census Bureau and U.S. Equal Employment Opportunity guidelines for collecting information on sex and race/ethnicity.

19. In which Texas County was a majority of your work performed (in 2015)?
*If majority was out-of-state or out-of-country, please note that below.*

_________________________________________________________________

20. Years of experience as an attorney, up to and including calendar year 2015:

<table>
<thead>
<tr>
<th>Years of Experience</th>
<th>2 or less years</th>
<th>3 to 6 years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>7 to 10 years</td>
<td>11 to 15 years</td>
</tr>
<tr>
<td></td>
<td>16 to 20 years</td>
<td>21 to 25 years</td>
</tr>
<tr>
<td></td>
<td>More than 25 years</td>
<td></td>
</tr>
</tbody>
</table>

21. Age:

<table>
<thead>
<tr>
<th>Age Range</th>
<th>21 to 25 years</th>
<th>26 to 30 years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>31 to 35 years</td>
<td>36 to 40 years</td>
</tr>
<tr>
<td></td>
<td>41 to 45 years</td>
<td>46 to 50 years</td>
</tr>
<tr>
<td></td>
<td>51 to 55 years</td>
<td>56 to 60 years</td>
</tr>
<tr>
<td></td>
<td>61 to 65 years</td>
<td>More than 65 years</td>
</tr>
</tbody>
</table>

22. Sex:

<table>
<thead>
<tr>
<th>Sex</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
</table>

23. Ethnicity:

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Hispanic or Latino</th>
<th>Not Hispanic or Latino</th>
</tr>
</thead>
</table>

24. Race:

<table>
<thead>
<tr>
<th>Race</th>
<th>White</th>
<th>Black or African American</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>American Indian or Alaska Native</td>
<td>Asian</td>
</tr>
<tr>
<td></td>
<td>Native Hawaiian or Other Pacific Islander</td>
<td>Two or More Races</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>
LAW SCHOOL/CAREER SATISFACTION

The purpose of these questions is to study the economic and non-economic value of a law degree and the associated attorney satisfaction with careers and decisions to attend law school. This information will help provide prospective law students and members of the bar with important information about legal careers in Texas.

25. Which of the following best describes your undergraduate major?

- ___ Business
- ___ Humanities
- ___ Criminal justice or law enforcement
- ___ Physical science or mathematics
- ___ Engineering
- ___ Social sciences
- ___ Other___________________

26. Which of the following best describes your class rank upon graduation from college?

- ___ Top 10th percentile
- ___ Top 25th percentile
- ___ Top 50th percentile
- ___ Top 75th percentile
- ___ Don’t know

27. Which of the following best describes your class rank upon graduation from law school?

- ___ Top 10th percentile
- ___ Top 25th percentile
- ___ Top 50th percentile
- ___ Top 75th percentile
- ___ Don’t know

28. Approximately how much student loan debt did you incur during law school?

- ___ None
- ___ $1,000 - $24,999
- ___ $25,000 - $49,999
- ___ $50,000 - $74,999
- ___ $75,000 - $99,999
- ___ $100,000 or more

29. At this point in your career, how much remaining law school debt do you have?

- ___ None
- ___ $1,000 - $24,999
- ___ $25,000 - $49,999
- ___ $50,000 - $74,999
- ___ $75,000 - $99,999
- ___ $100,000 or more

30. On a scale of 1 to 5 please provide your level of satisfaction on the following questions?

Please rate your level of satisfaction on a scale of 1 to 5 (1 being Very Dissatisfied and 5 being Very Satisfied).

- ___ How satisfied are you with your decision to have attended law school?
- ___ How satisfied are you with your career?
STATE BAR OF TEXAS MEMBER SERVICES
The State Bar of Texas offers many services to help attorneys in both their professional and personal lives. Within these services you can find access to hundreds of useful programs. The following questions will help measure both awareness of and satisfaction with the current services available to you. In addition, your feedback will help the State Bar understand what services you would like to see offered in the future.

31. Please provide information on your experience using the following State Bar of Texas Member Services

Please rate your level of satisfaction on a scale of 1 to 5 (1 being Very Dissatisfied and 5 being Very Satisfied).

[Satisfaction] scale: 1-Very Dissatisfied, 2-Somewhat Dissatisfied, 3-Neither Satisfied nor Dissatisfied, 4-Somewhat Satisfied, 5-Very Satisfied.

[Awareness] scale: 1-Aware of service but have no experience, 2-I am not aware of this service

<table>
<thead>
<tr>
<th>Service</th>
<th>Are you aware of the service (Y/N)</th>
<th>Satisfaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas Bar CLE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Client Attorney Assistance Program (CAAP)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Bar of Texas Advertising Review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas Lawyers’ Assistance Program (TLAP)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Bar of Texas Member Benefit Program</td>
<td></td>
<td></td>
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<tr>
<td>Texas Bar Journal</td>
<td></td>
<td></td>
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<tr>
<td>Texas Bar Career Center</td>
<td></td>
<td></td>
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<tr>
<td>Texas Bar Private Insurance Exchange</td>
<td></td>
<td></td>
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<tr>
<td>Free Legal Research (Fastcase, Casemaker)</td>
<td></td>
<td></td>
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<tr>
<td>Lawyer Referral and Information Services (LRIS)</td>
<td></td>
<td></td>
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<tr>
<td>Law Practice Management Program</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Bar of Texas Attorney Ethics Hotline</td>
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<td></td>
</tr>
</tbody>
</table>

32. Overall, how would you rate the TexasBarCLE’s CLE offerings compared with those of other CLE providers?

Please rate the following on a scale of 1 to 5 (1 being Much Worse and 5 being Much Better)

- Live courses
- Live webcasts
- 24/7 online classes
- Downloadable audio MP3s of programs
- Online library of CLE articles
- Course books

33. Please rate the level of importance of each consideration when choosing a particular CLE program:

Please rate the following on a scale of 1 to 5 (1 being Not at all Important and 5 being Very Important)

- Number of MCLE hours
- Course format
- Registration Fee
- Topics relevant to my practice
- Speakers’ reputation or expertise
- Length of course
- Location of course
- Course amenities
- Networking
STATE BAR OF TEXAS MEMBER SERVICES CONTINUED

34. How do you currently obtain your major medical health insurance?
   ___Through the Texas Bar Private Insurance Exchange
   ___Local Agent/Broker
   ___Direct through Insurance Carrier
   ___HealthCare.gov
   ___Through my Employer
   ___I do not currently have major medical health insurance
   ___Other ____________________

35. Do you carry any of the following types of insurance?

   Please select all that apply.
   ___Professional Liability (“Legal Malpractice”) Insurance
   ___Other Non-Legal Professional Liability (“E&O”) Insurance
   ___Cyber Breach Liability Insurance
   ___Business Owners Insurance
   ___Employment Practices Liability Insurance
   ___Other ____________________

36. Please indicate whether you have reached out to the Texas Lawyers’ Assistance Program (TLAP), on behalf of a lawyer or judge for one of the following mental health or substance use disorders

   Check all that apply.
   ___Depression
   ___Anxiety
   ___Alcohol abuse
   ___Drug abuse
   ___Suicidal ideation
   ___Age-related cognitive impairment
   ___Have not referred anyone
   ___Other ____________________

37. Please indicate any benefits and/or vendors you would like to see offered through the State Bar of Texas Member Benefit Program.

   __________________________________________________________________________
   __________________________________________________________________________

38. If you have any additional comments regarding the information collected with this survey, please provide them below:

   __________________________________________________________________________
   __________________________________________________________________________
June 11, 2018

Blake Hawthorne, Clerk

Re: No. 18-0278 in the Supreme Court of Texas (previously No. 05-16-00999-CV in the Fifth Court of Appeals);

Daniel S. Barnett, et al. vs. Richard B. Schiro

Dear Mr. Hawthorne:

Pursuant to Tex. R. App. P. 11, please receive this amended letter on behalf of amici curiae Carletta Guillory (Independent Executor of the Estate of Dorothy Dietrich, Deceased), Sharon Redd, and Robert Maurice Charvoz, Jr., who will be the source of any fee paid for submitting this letter.

Amici have an interest in this Court granting review in Barnett v. Schiro because they are currently suffering under a Kaufman County Court at Law No. 2 (Hon. Bobby L. Rich, Jr., presiding) February 7, 2018, modified final judgment awarding the opposing party (William E. Dietrich) $200,000.00 for attorney’s fees through trial (inexplicably twice), plus additional amounts in the event of an appeal to the 5th CA in Dallas (appeal already pending as 5th CA case no. 05-18-00504-CV) (original clerk’s record filed 5-10-2013) (timely requested reporter’s record filed after hours Thursday 6-7-2018, per 10:22 p.m. e-mail that evening from the official court reporter) and later this Court. These awards were made over objections (among others) that only oral testimony by the opposing party’s trial counsel was presented at trial, instead of contemporaneous time records some, but not all, of this Court’s precedents teach are required for attorney’s fee awards to survive legal sufficiency review. See attachments.

As things now stand, amici will have to acknowledge to the 5th CA that under Kinsel v. Lindsey, 526 S.W.3d 411, 427-28 (Tex. 2017), and Barnett v. Schiro, No. 05-16-00999-CV, 2018 WL 329772 (Tex. App.--Dallas Jan. 9, 2018, pet. filed [18-0278]) (Slip op. at 17-20), there can almost certainly be no rendition of judgment on appeal — but instead instead only a remand for new trial regarding attorney’s fees — if in fact Mr. Dietrich’s testifying counsel spoke the $200,000.00
Amici respectfully agree with petitioners that it is time to quit discriminating in favor of attorney’s fee expert witnesses and instead render, rather than remanding, when parties fail to introduce documentary evidence concerning tasks performed, persons who performed the work, and the time spent to accomplish the work in statutory fee-shifting contexts. Otherwise, there will continue to be unjustifiable discrimination between parties who present expert witness opinions about attorney’s fees deemed insufficient (remand), as opposed to parties presenting all other kinds of expert testimony deemed insufficient (render). See Hong v. Havey, No. 14-16-00949-CV, 2018 WL 2348413 (Tex. App.--Houston [14th Dist.] May 24, 2018, n.p.h.) (Slip. op. at 31-32) (opinion by Boyce, J.) (admitting evidence “must include, at a minimum, documentation of the services performed, who performed then and at what hourly rate, when they were performed and how much time the work required” under El Apple I, but nevertheless remanding case for a new trial on attorney’s fees — even though prevailing party below had failed in his burden of proof) (emphases added).

This is contrary to the law in all other contexts. See generally Coalition of Cities v. Public Util. Comm’n, 798 S.W.2d 560, 563-64 (Tex. 1990), cert. denied, 499 U.S. 983 (1991) (party who fails in its burden of proof “loses” and it is not entitled to a second trial to present more evidence); Texas Real Estate Comm’n v. Nagle, 767 S.W.2d 691, 695 (Tex. 1989) (“In an ordinary adversarial proceeding the failure of a party bearing the burden of proof would ordinarily result in rendition of judgment against that party”); Vista Chevrolet, Inc. v. Lewis, 709 S.W.2d 176, 176-77 (Tex. 1986) (per curiam) (emphasizing that rendition in such circumstances is “a basic rule of law”).

With utmost respect, there is no proper basis for discriminating in favor of claimants relying on expert opinion testimony to recover attorney’s fees under fee-shifting statutes, as opposed to claimants relying on expert opinion testimony in all other contexts. See generally Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 439 (Tex. 1984) (four-judge dissent by Judge Pope) (“There is no greater inequality than the unequal treatment by the same court of things that are equal”); U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”); see also U.S. Const. art. VI, cl. 2 (“the Judges in every State” are bound by the United States Constitution, “any Thing in the
Constitution or laws of [this] State to the contrary notwithstanding”). And no other court has authority to resolve the inconsistency in this Court’s attorney’s fee precedents.

Amici respectfully request that this Court request a response to the petition for review, request the record and full merits briefing, grant the petition for review, sustain the petitioners’ legal sufficiency challenge, and render judgment ordering that the respondent recover zero dollars for attorney’s fees.

Certificate of Service: I certify that I served an exact copy of this amended letter (with attachments) on counsel for petitioners and respondents (and counsel for Mr. Dietrich) by e-file and e-mail before 8:00 a.m. this morning June 11, 2018.

Respectfully submitted,

Ben Taylor (SBOT # 19684500)
counsel for amici curiae

cc: Charles W. McGarry (cmcgarry@ix.netcom.com) (petrs’ counsel)
    Robert M. “Bob” Clark (rmc@robertmclark.net) (petrs’ counsel)
    Katherine Elrich (kelrich@cobbmartinez.com) (respt’s counsel)
    Daniel D. Tostrud (dtostrud@cobbmartinez.com) (respt’s counsel)
    Lindsey K. Wyrick (lwyrick@cobbmartinez.com) (respt’s counsel)
    Ted Lyon (tblyon@tedlyon.com) (amici curiae’s counsel)
    Dennis Weitzel (dennis@tedlyon.com) (amici curiae’s counsel)
    Donna J. Yarborough (donna@djy-law.com) (counsel for the appellee,
    William W. Dietrich, in 5th CA case no. 05-18-00504-CV)

Cynthia Hollingsworth (chollingsworth@hwattorneys.com)
(recently added as lead appellate counsel for Mr. Dietrich)
CAUSE NO. 94304-CC2

CARLETTA GUILLORY, Independent Executor of the Estate of Dorothy Dietrich, Deceased, SHARON LYNN REDD and ROBERT MAURICE CHARVOZ, JR., Plaintiffs,

vs.

WILLIAM E. DIETRICH, Defendant.

KAUFMAN COUNTY, TEXAS

IN THE COUNTY COURT AT LAW NO. 2

Plaintiffs' Bench Brief in Opposition to Awarding Defendant William E. Dietrich Any Attorney's Fees

INTRODUCTION

Defendant, William E. Dietrich, is not entitled to an award of attorney's fees. Mr. Dietrich bears the burden of proof to support attorney's fees that are reasonable and necessary. Mr. Dietrich has offered no evidence or documentation to support an award for his attorney's fees through this trial. Furthermore, Mr. Dietrich failed to segregate his legal fees accrued for the one claim for which attorney's fees might be recoverable from all the rest that are not. Mr. Dietrich is not subject to an exception because his claims are not intertwined and are easily separable. Thus, this Court should deny an award for attorney's fees to Mr. Dietrich because he failed to satisfy his burden of proof and segregate his claims.

ARGUMENT

Mr. Dietrich is not entitled to any attorney's fees in this case. First, Mr. Dietrich failed to satisfy his burden of proof. Mr. Dietrich is required by the Uniform Declaratory Judgment Act ("UDJA") and Texas Civil Practice & Remedies Code to prove his attorney's fees are reasonable and necessary, and equitable and just. Second, Mr. Dietrich failed to segregate his claims and is not subject to an exception. Mr. Dietrich must segregate his legal fees accrued for those claims.
that attorney’s fees are recoverable from those that are not. Additionally, to be subject to exception, Mr. Dietrich must prove his claims are intertwined and inseparable. As a result, Mr. Dietrich is not entitled to an award for attorney’s fees because he did not satisfy his burden of proof, nor segregate his claims.

A. Mr. Dietrich failed to satisfy his burden of proof.

Mr. Dietrich is not entitled to an award of attorney’s fees in this litigation. Under the UDJA, a trial court is permitted to “award costs and reasonable and necessary attorney’s fees as are equitable and just.” Tex. Civ. Prac. & Rem. Code § 37.009. The Supreme Court of Texas has held “[t]he determination of reasonable and necessary attorney’s fees is an issue generally left to the trier of fact.” Kinsel v. Lindsey, 15-0403, 2017 WL 2324392, at *12 (Tex. May 26, 2017), reh’g denied (Sept. 22, 2017) (citing Smith v. Patrick W. Y. Tam Tr., 296 S.W.3d 545, 547 (Tex. 2009)). “The party seeking recovery bears the burden of proof to support the award.” Id.

Here, Mr. Dietrich failed to provide any evidence sufficient to satisfy his burden of proving he is entitled to any relief under the UDJA. Mr. Dietrich sought reasonable and necessary attorney’s fees in (and as part of) his Petition for Declaratory Judgment. However, Mr. Dietrich failed to set forth any meaningful facts or documentation to support that a Declaratory Judgment is warranted or that the fees sought are reasonable or necessary. Instead, Mr. Dietrich’s Counsel testified at trial about: (1) her legal services rendered, her related experience, working a total of 840 hours in this litigation, reducing her hourly fee in this case from $400 per hour to $300 per hour, and asked this Court to award Mr. Dietrich $160,000 in attorney’s fees. Mr. Dietrich’s Counsel did not specify any considerable factors, reasonable determinations, nor provide documentation as to how she calculated her total legal fees in this
case. Thus, the evidence is insufficient to award Mr. Dietrich $160,000 in attorney's fees because the quantum of evidence is lacking in specifics and is legally insufficient.

B. **Mr. Dietrich further failed to segregate his claims and is not subject to an exception.**

Mr. Dietrich is not entitled to an award for any or certainly not all of attorney's fees because he failed to segregate his legal fees with respect to his claims and he is not subject to an exception. “A claimant must segregate legal fees accrued for those claims for which attorney's fees are recoverable from those that are not.” *Kinsel*, 15-0403, 2017 WL 2324392, at *12 (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006)). “An exception exists only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible.” *Id.* However, only discrete legal services can advance both recoverable and non-recoverable claims that are so intertwined that they cannot be segregated. *Id.*

Here, Mr. Dietrich's failure to segregate his claims negates any possible award for attorney's fees. To recover attorney's fees, Mr. Dietrich was required to segregate work relating to recoverable and non-recoverable claims. Mr. Dietrich failed to provide any evidence that he segregated his claims. Furthermore, Mr. Dietrich did not provide any evidence to prove his claims arose out of the same transaction or that they are so intertwined and inseparable to make segregation impossible. Additionally, Mr. Dietrich's claims do not relate to discrete legal services. Thus, Mr. Dietrich is not entitled to an award for attorney's fees because he failed to segregate his claims and he is not subject to an exception.

**CONCLUSION**

This Court should not award Mr. Dietrich attorney's fees because he failed to satisfy his burden of proof entitling him to a Declaratory Judgment, failed to segregate his claims, and is not
subject to an exception. On the evidence presented at trial, this Court should render judgment that Mr. Dietrich recover zero dollars in attorney's fees.

Respectfully Submitted,

TED B. LYON & ASSOCIATES, P.C.

By: /s/ Dennis Weitzel

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tblyon@tedlyon.com

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dennis@tedlyon.com
Town East Tower – Suite 525
18601 LBJ Freeway
Mesquite, Texas 75150
Ph: 972.279.6571
Fax: 972.279.3021

ATTORNEYS FOR PLAINTIFFS
CERTIFICATE OF SERVICE

Pursuant to Rule 21(a) of the Texas Rules of Civil Procedure, I hereby certify that a true and correct copy of the foregoing document has been served upon all counsel of record by facsimile, hand delivery, U.S. First Class Mail and/or certified mail, return receipt requested, on this the 28th day of September, 2017.

via facsimile: 214.367.6001
Donna J. Yarborough
Donna J. Yarborough, PLLC
8150 N. Central Expressway, 10th Floor
Dallas, Texas 75206

/s/ Dennis Weitzel
DENNIS WEITZEL

PLAINTIFFS' BENCH BRIEF IN OPPOSITION OF AWARDING DEFENDANT WILLIAM E. DIETRICH ATTORNEY'S FEES

383
CAUSE NO. 94304-CC2

CARLETTA GUILLORY, Independent Executor of the Estate of Dorothy Dietrich, Deceased, SHARON LYNN REDD and ROBERT MAURICE CHARVOZ, JR.,
Plaintiffs

vs.

WILLIAM E. DIETRICH,
Defendant

COUNTY COURT AT LAW

NO. 2 IN AND FOR

KAUFMAN COUNTY, TEXAS

MODIFIED FINAL JUDGMENT

On July 31, 2017, this case was called to trial. Carletta Guillory, Sharon Redd and Robert Maurice Charvoz, Jr., Plaintiffs/Counter Defendants, appeared in person and through their attorney of record, Ted B. Lyon, and announced ready for trial. William E. Dietrich, Defendant/Counter Plaintiff, appeared in person and through his attorney of record, Donna J. Yarborough, and announced ready. The case proceeded to trial and the trial was later recessed until September 19, 2017. All matters in controversy, legal and factual, were submitted to the Court for determination. The Court heard the evidence and arguments of counsel. On December 13, 2017, this Court signed a judgment in favor of Defendant and against Plaintiffs.

Thereafter, Plaintiffs timely filed motions for new trial and to modify the judgment. It appears to the Court that the judgment signed on December 13, 2017 should be modified in part. Therefore, it is hereby ordered that the judgment signed on December 13, 2017 is hereby vacated and the judgment of the Court is as follows:

The Court RENDERS judgment for Defendant.
Accordingly, the Court ORDERS that Plaintiffs take nothing and that Defendant recover the following from Plaintiffs/ Counter Defendants, jointly and severally:

Actual damages in the amount of $17,120.98 for the conversion of the USAA Subscriber Savings Account;

Actual damages in the amount $7,300.00 for the conversion and unjust enrichment of the claim for missing jewelry proceeds from USAA;

Actual damages in the amount of $26,429.00 for the conversion and unjust enrichment of the reimbursement proceeds from Genworth long-term care;

Actual damages in the amount of $40.00 for the late fee charge incurred by Defendant for property taxes;

Actual damages in the amount of $24,280.00 for one-half (1/2) of the federal income taxes owed by the Decedent's Estate;

Reasonable and necessary attorney fees in the amount of $200,000.00 for the prosecution of this case through this judgment. The Court further orders that if Plaintiffs unsuccessfully appeal this judgment to an intermediate court of appeals, Defendant will additionally recover from Plaintiffs the amount of $5,000.00 representing the anticipated reasonable and necessary attorney fees that would be incurred by Defendant in defending the appeal. The Court further orders that if Plaintiffs unsuccessfully appeal this judgment to the Texas Supreme Court, Defendant will additionally recover from Plaintiffs the amount of $10,000.00, representing the anticipated reasonable and necessary attorney fees that would be incurred by Defendant in defending the appeal.
IT IS FURTHER ORDERED that Defendant recover from the Plaintiffs/Counter Defendants exemplary damages for acting with malice, individually and in conspiracy, to intentionally cause substantial harm to Defendant as follows:

from Carletta Guillory, individually, the sum of $8,333.34.
from Sharon Redd, individually, the sum of $8,333.33, and
from Robert Maurice Charvoz, Jr., individually, the sum of $8,333.33.

IT IS FURTHER ORDERED that Defendant recover from the Plaintiffs/Counter Defendants exemplary damages for acting individually and in conspiracy to intentionally cause financial and emotional harm Defendant as follows:

from Carletta Guillory, individually, the sum of $8,333.34.
from Sharon Redd, individually, the sum of $8,333.33, and
from Robert Maurice Charvoz, Jr., individually, the sum of $8,333.33.

IT IS FURTHER ORDERED that Defendant recover from the Plaintiffs/Counter Defendants prejudgment interest on the actual damages awarded at the rate of five (5) percent interest from December 19, 2015, in the amount of $8,155.38 as of February 7, 2018 and $10.2972 interest daily thereafter until this judgment is signed.

IT IS FURTHER ORDERED that Defendant recover from the Plaintiffs/Counter Defendants reasonable and necessary attorney fees in the amount of $200,000.00 for the prosecution of this case through this judgment. The Court further orders that if Plaintiffs unsuccessfully appeal this judgment to an intermediate court of appeals, Defendant will additionally recover from Plaintiffs the amount of $5,000.00 representing the anticipated reasonable and necessary attorney fees that would be incurred by Defendant in defending the appeal. The Court further orders that if Plaintiffs
unsuccessfully appeal this judgment to the Texas Supreme Court, Defendant will additionally recover from Plaintiffs the amount of $10,000.00, representing the anticipated reasonable and necessary attorney fees that would be incurred by Defendant in defending the appeal.

IT IS FURTHER ORDERED that Defendant recover from the Plaintiffs/Counter Defendants post judgment interest on all of the above at the rate of 5 per cent, compounded annually, from the date this judgment is rendered until all amounts are paid in full.

IT IS FURTHER ORDERED and hereby DECLARED as follows:

that the contractual Wills executed by Decedent and Defendant did not create separate property agreements;

that Defendant did not breach the terms of his contractual Will;

that Decedent's Estate owes one-half (1/2) of the federal income taxes incurred by Decedent and Defendant during Decedent's lifetime, less any penalties and interest;

that Lot 44 of Wellington Park, a subdivision in Kaufman, Kaufman County, Texas, located immediately adjacent to the homestead of Defendant and decedent at 108 Heatherstone Circle, Kaufman, Texas is Defendant's community property; and

that Defendant is allowed change the beneficiaries of his Edward Jones accounts as they are not part of the contractual Wills and are outside of the probate estate.

IT IS FURTHER ORDERED that Plaintiffs, Carletta Guillory, Sharon Redd and Robert Maurice Charvoz, Jr. are hereby ordered to pay Melinda J. Hartnett's attorney ad litem's fees in the amount of $6,881.66 on or before the 29th date of December,
2017 to be delivered to and made payable to The Hartnett Law Firm, 2920 N. Pearl Street, Dallas, Texas 75201-1108.

IT IS FURTHER ORDERED that all costs of Court spent or incurred in this cause, are adjudged against Carletta Guillory, Sharon Redd and Robert Maurice Charvoz, Jr., jointly and severally.

IT IS FURTHER ORDERED execution to issue for this judgment and that all writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

All relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable.

SIGNED on February 7, 2018.

Bobby L. Rich, Jr., Judge Presiding

APPROVED AS TO FORM:

TED B. LYON
Counsel for Plaintiffs/Counter Defendants

DONNA J. YARBOROUGH
Counsel for Defendant/Counter Plaintiff
CAUSE NO. 004-01346-2014

IN THE COUNTY COURT

OF COLLIN COUNTY, TEXAS

Plaintiffs' file this Response to Defendant Azeb Ruder's Motion for Attorneys' Fees, Costs, and Sanctions, and would show the Court as follows:

I. The attorneys' fees and expenses sought by Defendant Azeb Ruder under § 27.009(a) of the Texas Civil Practice & Remedies Code are improperly proven, unreasonable, and unjust.

Section 27.009(a)(1) provides that a Court ordering dismissal of a legal action under Chapter 27 of the Texas Civil Practice and Remedies Code shall award to the moving party “the court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require.” TEX. CIV. PRAC. & REM. CODE §27.009(a)(1). Under the express terms of the statute, the moving party must establish that the fees are “reasonable” and “incurred.” An award of attorneys’ fees must be supported by evidence, and the party seeking the fees carries the burden of proof. See, e.g., Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998)(noting it is an abuse of discretion to award attorneys’ fees without sufficient supporting evidence); Smith v. Patrick W.Y. Tam Trust, 296 S.W. 3d 545, 547 (Tex. 2009)(citing Stewart Title Guar. Co. V. Sterling, 822 S.W.2d 1, 10 (Tex. 1991)). A party with the burden of
proof who fails to produce evidence of attorneys’ fees waives the party’s right to those fees. *Intercontinental Group P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657 (Tex. 2009).

A. The attorneys’ fees claimed by Defendant are unreasonable, and include matters unrelated to defending against the defamation claim.

Defendant in her Amended Motion to Dismiss sought dismissal of Plaintiffs’ breach of contract claims under various theories, as well as dismissal of Plaintiff Kathy Jabri’s defamation claims under Chapter 27 of the Texas Civil Practice and Remedies Code. Section 27.009(a) merely entitles the moving party to reasonable and incurred attorney’s fees and expenses related to dismissal of the defamation claim under the statute. The “itemized fee statement reflecting attorneys’ fees and related costs” in connection with defendant’s motion to dismiss and appeal attached to the Affidavit of Kennedy Barnes includes fees and expenses entirely unrelated to Defendant’s defense against the defamation claims. Further, with regard to the fees that are related, the fees sought are unreasonable considering the nature of the case, which does not involve novel or particularly difficult issues.

1. Defendant’s claim for attorneys’ fees and expenses includes services and costs unrelated to Defendant’s motion to dismiss under Chapter 27.

A party seeking to recover attorneys’ fees in a suit involving multiple claims has a duty to segregate recoverable from unrecoverable fees. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). Based on the description of the work in the itemized statement, Defendant has claimed attorney’s fees and expenses related to her defense against Plaintiffs’ breach of contract claims, including $2,100 in attorneys’ fees related entirely to the breach of contract claims, $14,950 in attorneys’ fees in which Defendant did not segregate the services related to the breach of contract claim, and $4,441.64 in electronic research expenses in which Defendant did not segregate services related to the breach of contract claim. This Court should
not award the attorneys’ fees and expenses unrelated to Defendant’s defense of the defamation claims in this case.

a. Fee claims unrelated to defense of defamation claim

Specifically, Plaintiffs claim that the following services are wholly unrelated to Defendant’s defense of the defamation claim:

<table>
<thead>
<tr>
<th>Date</th>
<th>Attorney</th>
<th>Rate</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>08/11/14</td>
<td>KLB</td>
<td>.50 500.00/hour</td>
<td>Draft letter to K. Lafferty regarding dismissal of claims.</td>
<td>250.00</td>
</tr>
<tr>
<td>08/12/14</td>
<td>KLB</td>
<td>3.5 500.00/hour</td>
<td>Pursue research re potential defenses and claims related to real estate contract.</td>
<td>1,750.00</td>
</tr>
<tr>
<td>09/03/14</td>
<td>KLB</td>
<td>0.2 500.00/hour</td>
<td>Prepare subpoena to Bill Jordan for hearing.</td>
<td>100.00</td>
</tr>
</tbody>
</table>

Plaintiffs have attached the correspondence received from opposing counsel in this matter on August 11, 2014 under Tab 1 of Exhibit A, Affidavit of Kimberly Lafferty. Neither of the correspondences received on that date reference Jabri’s defamation claim. Even if the Court were to consider that correspondence requesting a telephone call to discuss the two-page letter sent to Azeb Ruder on July 15, 2014 could potentially concern the defamation claim, the charge of a $250.00 (0.5 at $500/hour) to draft a three-sentence letter is unreasonable.

The entry for August 12, 2014 indicates that the research completed on that date related to the “real estate contract.” The defamation claims asserted did not involve the “real estate contract,” but rather statements made by Defendant related to the marketing of her property. This description of services, therefore, does not appear to apply to Defendant’s defense of the defamation claims.

Likewise, the subpoena for Bill Jordan to appear at the motion to dismiss hearing related to Defendant’s motion to dismiss the Listing Agreement with William Davis Realty, in which
Defendant claimed William Davis Realty, the d/b/a for Bill Jordan and William Davis Real Estate Services, LLC, lacked jurisdiction because it was not a licensed broker in the state. Defendant never sought to subpoena Kathy Jabri, the subject of the defamation claim, thereby lending credence that Mr. Jordan’s testimony was sought solely for defense of the contract matter rather than defense of the defamation claim.

b. **Matters where Defendant failed to segregate legal services and expenses in defense of defamation claim from contract claim.**

Plaintiffs assert that the following claims fail to segregate legal services for defense of the defamation claim from the contract claim:

<table>
<thead>
<tr>
<th>Date</th>
<th>Atty</th>
<th>Rate</th>
<th>Description</th>
<th>Amount</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>08/13/14</td>
<td>KLB</td>
<td>3.8</td>
<td>500.00/hour Confer with A. Ruder re background, review letter from K. Lafferty providing information concerning claim and plaintiffs.</td>
<td>1,900.00</td>
<td>The correspondence from K. Lafferty solely concerned matters related to Listing Agreement and breach of contract. See Tab 2, Exhibit A, Affidavit of Kimberly Lafferty.</td>
</tr>
<tr>
<td>08/22/14</td>
<td>KLB</td>
<td>5.5</td>
<td>500.00/hour Pursue strategy for resolution of claims and potential counterclaims, including research regarding TCPA; confer with A. Ruder re same.</td>
<td>2,750.00</td>
<td>Defendant has not segregated time related to TCPA from contract matters. Opposing counsel sent correspondence addressing all claims. See Tab 3, Exhibit A, Affidavit of Kimberly Lafferty.</td>
</tr>
<tr>
<td>09/02/14</td>
<td>KLB</td>
<td>1.3</td>
<td>500.00/hour Draft letter to K. Lafferty re amended application for injunctive relief; revise amended motion to dismiss.</td>
<td>650.00</td>
<td>In addition to adding a motion to dismiss the defamation claims under the TCPA, Defendant revised her theories for dismissal of the contract claims. Contract issues were discussed in 10 pages of the 13-page Amended Motion to Dismiss.</td>
</tr>
<tr>
<td>09/04/14</td>
<td>KLB</td>
<td>2.5</td>
<td>500.00/hour Draft reply brief related to motion to Dismiss.</td>
<td>1,250.00</td>
<td>Defendant has not segregated time related to TCPA from contract matters. Five pages of the 10-page Reply Brief concerns contract issues.</td>
</tr>
<tr>
<td>Date</td>
<td>Atty</td>
<td>Rate</td>
<td>Description</td>
<td>Amount</td>
<td>Comment</td>
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<td>----------</td>
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<td>-----------------------------------------------------------------------------</td>
<td>---------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>09/05/14</td>
<td>KLB</td>
<td>2.10</td>
<td>Continue draft of reply brief.</td>
<td>1,050.00</td>
<td>Defendant has not segregated time related to TCPA from contract matters. Five pages of the 10-page Reply Brief concerns contract issues.</td>
</tr>
<tr>
<td>09/06/14</td>
<td>LLB</td>
<td>1.8</td>
<td>Draft and revise Reply in Support of Motion to Dismiss.</td>
<td>270.00</td>
<td></td>
</tr>
<tr>
<td>09/08/14</td>
<td>KLB</td>
<td>2.0</td>
<td>Finalize reply in support of motion to Dismiss.</td>
<td>1,000.00</td>
<td></td>
</tr>
<tr>
<td>09/08/14</td>
<td>LLB</td>
<td>.5</td>
<td>Revise and ensure citation accuracy of Reply in Support of Motion to Dismiss.</td>
<td>75.00</td>
<td></td>
</tr>
<tr>
<td>09/10/14</td>
<td>KLB</td>
<td>3.0</td>
<td>Prepare for hearing on motion to dismiss.</td>
<td>1,500.00</td>
<td></td>
</tr>
<tr>
<td>09/10/14</td>
<td>LLB</td>
<td>.7</td>
<td>Conduct research regarding case law citing in Reply to Response to Motion to Dismiss, in preparation for hearing on Motion to Dismiss.</td>
<td>105.00</td>
<td></td>
</tr>
<tr>
<td>09/11/14</td>
<td>KLB</td>
<td>3.8</td>
<td>Prepare for and attend hearing on motion to dismiss. Confer with A. Ruder regarding hearing and decision.</td>
<td>1,900.00</td>
<td></td>
</tr>
<tr>
<td>11/05/14</td>
<td>KLB</td>
<td>2.0</td>
<td>Continue review of appellant’s brief; pursue admissions and review of agreements to pursue summary judgment issues and evidence.</td>
<td>1,000.00</td>
<td>This description includes time related Defendant’s request for admissions to Bill Jordan, William Davis Real Estate Services, LLC, and Kathy Jabri solely concerning Listing Agreement, and related issues. See Tab 4, Exhibit A, Affidavit of Kimberly Lafferty.</td>
</tr>
<tr>
<td>12/11/14</td>
<td>KLB</td>
<td>2.0</td>
<td>Review revised draft of appeals brief; confer with opposing counsel re schedule.</td>
<td>1,000.00</td>
<td>Scheduling description refers to opposing counsel’s request to stay contract proceedings until Court of Appeals rendered opinion.</td>
</tr>
<tr>
<td>12/16/14</td>
<td>KBL</td>
<td>1.0</td>
<td>Review final appellate brief; pursue motion for continuance.</td>
<td>500.00</td>
<td>Motion for continuance and stay of contract claims pending Court of Appeals Decision.</td>
</tr>
</tbody>
</table>

**TOTAL** $14,950.00
Plaintiffs also assert that Defendant has failed to provide sufficient detail to determine whether segregation of the listed expenses is required. The expenses related to “electronic research” were not set forth individually for the date the research occurred; rather, Defendant appears to have provided the monthly expense for the electronic research from both LEXIS NEXIS and Westlaw. Based on the unsegregated attorney fee entries, it appears the research expenses could include amounts related to the defense of the contract claims, which are not recoverable under Section 27.009(a)(1).

c. Attorney fees unreasonable.

“A reasonable fee is one that is not excessive or extreme, but rather moderate or fair.” See Garcia v. Gomez, 319 S.W.3d 638, 644 (Tex. 2010) (defining reasonable in conjunction with attorneys’ fees). In addition to including fees unrelated to the defense of the defamation claim, the attorneys’ fees sought by Defendant in her motion are excessive. Plaintiffs contend that the time spent on tasks was unreasonable and that the billing rate of $500 per hour is disproportionate to the fees generally charged in similar cases in Collin County.

The time entries related to Defendant’s Reply to Plaintiff’s Response to Defendant’s Amended Motion to Dismiss indicates that the attorneys spent 13.1 hours (6.6 hours for KLB and 6.5 hours for LLB) to draft Defendant’s 10-page reply brief, five of which pages pertained to Defendant’s motion to dismiss Plaintiff’s breach of contract claims. The preparation of the 20-page appellate brief filed by Defendant reportedly required 38.9 hours to research and draft (5.0 hours for KLB and 33.9 hours for LLB). This time includes 10 hours of research pertaining to the Texas Citizen Participation Act and defamation claims, which is in addition to the 8.5 hours of research previously completed on the same topics in connection with the pursuit of the motion to dismiss in the trial court. The Texas Citizen Participation Act was enacted in 2011; a search
of the case law from enactment until November 6, 2014 (the date Defendant filed her appellate brief) showed that only 46 Texas cases addressing the TCPA existed at that time. Defendant then claims 7.5 additional hours of research on defamation issues for the reply to Appellee’s Response. These entries include subjects previously researched. The attorney with initials LLB drafted Defendant’s appellate reply brief apparently with oversight from Kennedy Barnes. The time entries indicate that LLB took 18.7 hours to draft the 18-page reply. The time for KLB appears to include entries related to the breach of contract claims; KLB, however, spent at least 2 hours in connection with this briefing.

Plaintiffs contend that the research and drafting time is unreasonable in light of the task to be completed. In comparison, Plaintiffs’ counsel spent 4.8 hours to prepare a response to Defendant’s motion to dismiss under the Texas Citizen Participation Act, which includes the time to both research the issues and draft a 7-page response with accompanying affidavits and evidence to the motion to dismiss under Chapter 27. See Exhibit A. Plaintiffs’ counsel spent a total of 18 hours on tasks associated with the appellate briefing. See Exhibit A. Considering the issues presented, the attorneys’ fees demanded by Defendant are disproportionate to the work involved.

Further, the $500 per hour rate is not reasonable. Based on his profile on Linked In, Mr. Barnes practice primarily involves complex commercial litigation in state and federal courts in Texas, New York, and Nevada. The site indicates that his industry expertise includes media, finance and securities litigation, and energy and international dispute resolution. While a complex commercial case in federal court may warrant a $500 per hour rate, a defamation and breach of contract case filed in a Collin County Court of Law does not command such a billable

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1 See https://www.linkedin.com/pub/kennedy-barnes/6/b48/a64.
rate. Plaintiffs contend this amount is excessive for similar actions filed in Collin County, Texas. See Exhibit A, Paragraph 10.

**B. Defendant has not established that she incurred attorneys’ fees and certain costs in connection with defending against the defamation claim.**

Section 27.009(a) of the Texas Civil Practice and Remedies Code limits the award of attorneys’ fees with the terms “reasonable” and “incurred.” *Cruz v. Van Sickle*, 452 S.W.3d 503, 522-23 (Tex. App.—Dallas 2014, pet. filed). Under the statute, the Court may award the lesser of the amount of reasonable attorneys’ fees and expenses, or the amount of the fees actually incurred. *Id.* Courts have interpreted “incurred” to mean “liable for payment.” See *Garcia*, 319 S.W.3d at 642; *Cruz*, 452 S.W.3d at 522. A defendant represented pro bono has not incurred attorneys’ fees under Section 27.009(a)(1) of the Texas Civil Practice and Remedies Code.

Defendant’s counsel on January 12, 2015 stated to Plaintiffs’ counsel that his firm could forego attorneys’ fees, but would not cover Defendant’s out-of-pocket expenses related to the case. See Exhibit A, Paragraph 11. In light of this disclosure, Plaintiffs question whether Defendant has incurred fees as contemplated under the statute. In connection with the motion, Plaintiffs merely received the affidavit from Kennedy Barnes that attached an itemized list of legal services and expenses purportedly related to Defendant’s motion to dismiss. Defendant has not provided an agreement for the payment of attorney fees, any billing statements, or evidence showing amounts paid. Plaintiffs contend that Defendant’s affidavit and supporting documentation does not sufficiently establish that Defendant is liable for payment of the fees, especially in view of statement made by Mr. Barnes on January 12, 2015 regarding attorney fees. Accordingly, Plaintiffs assert that Defendant is not entitled to attorneys’ fees related to her Texas
Citizen Participation Act defense because she is not liable for the attorneys’ fees set forth in the itemized fee statement attached to Kennedy Barnes’ affidavit.

C. In the event the Court determines Defendant incurred attorneys’ fees, the Court should decrease the reasonable attorney fee amount in the interest of justice and equity.

In addition to the statutory limitation that the attorneys’ fees awarded are reasonable and incurred, the phrase “as justice and equity may require” in Section 27.009(a)(1) places another limitation on the trial court’s award of attorney fees and expenses. See Avila v. Larrea, 2015 Tex. App. LEXIS 6340, *10 (Tex. App.—Dallas, June 23, 2015). “Whether the amount of an award of attorney’s fees and other expenses incurred in defending against the action is equitable and just is left to the sound discretion of the trial court.” Id. at *10-11 (citing Cruz, 452 S.W.3d at 526). Fees awarded under Section 27.009(a) can be no more than reasonable and incurred, but may be less than that in view of pertinent considerations of justice and equity. See Id. at *11.

Should the Court determine that Defendant is liable for attorney fees in connection with her defense against the defamation claims, Plaintiffs request that the Court reduce the amount of reasonable and incurred attorneys’ fees. In response to Defendant’s motion to dismiss, Plaintiff Kathy Jabri identified two false factual statements in Defendant’s publication. Plaintiff Kathy Jabri in her response to Defendant’s motion to dismiss and during the hearing requested the Court allow limited discovery concerning Defendant’s statement that “I have been told by over a dozen Realtors NO ONE would do that for any reason, because they value their reputation, I was asked if it is incompetence, unstable mind, or rage induced by rejection.” The trial court denied Defendant’s motion to dismiss the defamation claims, thereby rending the request for discovery moot. As a result, Plaintiff was unable to provide any evidence regarding the falsity of this statement in the accelerated interlocutory appeal proceedings. In light of the circumstance,
justice and equity requires a reduction of any reasonable attorneys’ fees incurred by Defendant in defense of the defamation claim. Plaintiffs, therefore, request that the trial court award an amount less than the reasonable attorneys’ fees incurred by Defendant, if any.

II. 

No sanctions are necessary to deter Plaintiffs from filing a similar defamation action.

Without providing supporting evidence or reasoning, Defendant demands $10,000 in sanctions against Plaintiffs under Section 27.009(a)(2) of the Texas Civil Practice and Remedies Code. Plaintiffs submit that no basis exists to award this amount in sanctions. Plaintiff Kathy Jabri is an individual who makes her living on commissions from real estate transactions. She has never filed a defamation case in the past, and pursued this action because she believed the Zillow.com review by Defendant factually misrepresented the circumstances, thereby harming her reputation. Plaintiffs’ past and current actions do not indicate that sanctions are necessary to deter Plaintiffs from bringing similar actions. Should the Court award any sanctions, Plaintiffs submit that a nominal amount is sufficient.

III. 

Prayer

Considering the foregoing, Plaintiffs pray that the Court deny Defendant’s motion for an award of $30,380.00 in attorneys’ fees and $5,464.70 in expenses; determine the amount of reasonable attorneys’ fees and expenses incurred by Defendant in defense of the defamation claim, if any, and award only the reasonable and incurred attorneys’ fees as justice and equity may require; deny Defendant’s motion for $10,000 in sanctions, and either make a finding that no sanctions are warranted or award a nominal amount for sanctions; and grant such other relief in law and in equity to which Plaintiffs may show they are entitled.
Respectfully submitted,

Kimberly R. Lafferty  
Texas Bar No. 00796915  
LAFFERTY LAW FIRM, PLLC  
3100 Independence Pkwy.  
PMB 239, Ste. 311  
Plano, Texas 75075  
(p) 972.905.3812  
(f) 972.905.3811  
klafferty@LS-Law.net

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2015, a true and correct copy of the foregoing document was served on Defendant’s counsel of record in accordance with Texas Rule of Civil Procedure 21a as follows:

*Via electronic service*
Kennedy Barnes  
LACKEY HERSHEYMAN  
3102 Oak Lawn Ave., Ste.777  
Dallas, TX 75219-4241

Kimberly R. Lafferty
CAUSE NO. 004-01346-2014

WILLIAM JORDAN d/b/a WILLIAM DAVIS REALTY, WILLIAM DAVIS REAL ESTATE SERVICES, LLC d/b/a WILLIAM DAVIS REALTY, AND KATHY JABRI, Plaintiffs

v.

AZEB RUDER, Defendant.

IN THE COUNTY COURT AT LAW NO. 4
OF COLLIN COUNTY, TEXAS

AFFIDAVIT OF KIMBERLY LAFFERTY

BEFORE ME, the undersigned authority, this day personally appeared Kimberly Lafferty, who after being duly sworn, on oath deposes and says:

1. “My name is Kimberly Lafferty, and I am over the age of twenty-one, of sound mind, and fully competent to execute this affidavit. I have never been convicted of a felony or crime of moral turpitude. I have personal knowledge of the matters hereinafter stated, and I am competent to testify as to such matters in court.

2. I am an attorney licensed to practice law in the State of Texas, and have 20 years experience litigating commercial, tort, and employment cases for governmental entities and small businesses in Collin, Dallas, Denton, and Tarrant County Courts. My practice also includes appellate work, and during my tenure as an attorney I have successfully prosecuted over 200 appeals.

3. Plaintiffs William Davis Realty and Kathy Jabri retained me to represent them in the above-referenced matter, which involves breach of contract and defamation claims. I have personal knowledge of this case, and the work performed.

4. Plaintiffs in their Response to Defendant’s Request for Disclosures have designated me as an expert witness with regard to the reasonable and necessary attorneys’ fees and expenses in this matter. Defendant in support of her Motion for Attorneys’ Fees, Costs, and Sanctions has submitted the affidavit of Kennedy Barnes, which includes an itemized statement of attorneys’ fees and expenses related to defendant’s motion to dismiss and appeal. Based on
my review and analysis of this information, it is my opinion that the attorneys' fees and expenses claimed by Defendant in defense of the defamation claim are not reasonable, and include matters for which Defendant is not entitled to recovery of legal fees under Section 27.009(a)(1) of the Texas Civil Practice and Remedies Code.

5. Defendant's motion to dismiss the defamation claims and subsequent appeal did not involve novel or difficult issues. Ultimately, Plaintiff Kathy Jabri had the burden of proof with respect to both the trial court and appellate proceedings under Chapter 27. The time expended by Defendant's counsel in prosecution of the motion to dismiss Plaintiff's defamation claims and subsequent interlocutory appeal is not reasonable.

6. For example, the time entries related to Defendant's Reply to Plaintiff's Response to Defendant's Amended Motion to Dismiss provides that "KLB" expended 6.6 hours and "LLB" expended 6.5 hours to draft the 10-page brief, of which only five pages pertained to the motion to dismiss the defamation claims. Defendant's counsel expended a total of 38.9 hours in preparation of a 20-page appellate brief for the interlocutory appeal, which largely tracks the arguments previously made in the pleadings before the trial court. Defendant's counsel further expended approximately 30 hours in preparation of an 18-page Reply Brief in the Appellate Court. The time entries also provide for over 25 hours of research related to the Texas Citizen Participation Act and defamation claim. I conducted a search on Lexis Nexis for the Texas case law pertaining to the Texas Citizen Participation Act from the date of its enactment in 2011 until the date Defendant filed her appellate brief, and the search yielded a net result of 46 cases. Considering the nature of the controversy, including the fact that Plaintiffs' bore the burden of proof on the issues, the time claimed for researching and drafting the motion to dismiss and appellate briefing is excessive.

7. In comparison, Plaintiffs have expended a total of 22.8 hours in defense of the motion to dismiss in the trial court and on appeal. Since the inception of the case, I have segregated the entries for legal services related to the defamation claims from the breach of contract claims because Plaintiffs' sought recovery of attorneys' fees under the terms of the Listing Agreement and Chapter 38 of the Texas Civil Practice and Remedies Code. I expended 4.8

1 Affiant is unable to provide a definitive number of hours because Defendant failed to segregate the fees related to the defamation claim from the breach of contract claim in the itemized statement provided with the Affidavit of Kennedy Barnes.
hours to research the issues and evidence, plus draft Plaintiffs' Response to the Defendant's motion to dismiss the defamation claims under the Texas Participation Act. Additionally, I expended a total of 18 hours reviewing the Court's Record, the Clerk's Record, case law cited by Defendant in her briefing, and drafting Plaintiffs' appellate briefing.

8. I am also of the opinion that the time entries provided include legal services that are unrelated to Defendant's defense of the defamation claims. Defendant's Amended Motion to Dismiss sought dismissal of Plaintiffs' breach of contract claims in addition to the defamation claims. The time entries provided by Defendant refer generally to the “Motion to Dismiss,” and do not segregate the time expended in defense of the breach of contract claims. The following is a summary of the time entries I believe contain attorney time expended in defense of Plaintiffs' breach of contract claims, along with my observations and regarding the unrelated work:

<table>
<thead>
<tr>
<th>Date</th>
<th>Atty</th>
<th>Rate</th>
<th>Description</th>
<th>Amount</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>08/13/14</td>
<td>KLB</td>
<td>3.8</td>
<td>Confer with A. Ruder re background, review letter from K. Lafferty providing information concerning claim and plaintiffs.</td>
<td>1,900.00</td>
<td>The correspondence from K. Lafferty solely concerned matters related to Listing Agreement and breach of contract. A true and correct copy of this correspondence is attached under Tab 2.</td>
</tr>
<tr>
<td>08/22/14</td>
<td>KLB</td>
<td>5.5</td>
<td>Pursue strategy for resolution of claims and potential counterclaims, including research regarding TCPA; confer with A. Ruder re same.</td>
<td>2,750.00</td>
<td>Defendant has not segregated time related to TCPA from contract matters. Opposing counsel sent correspondence addressing all claims. A true and correct copy of this correspondence is attached under Tab 3.</td>
</tr>
<tr>
<td>09/02/14</td>
<td>KLB</td>
<td>1.3</td>
<td>Draft letter to K. Lafferty re amended application for injunctive relief; revise amended motion to dismiss.</td>
<td>650.00</td>
<td>In addition to adding a motion to dismiss the defamation claims under the TCPA, Defendant revised her theories for dismissal of the contract claims. Contract issues were discussed in 10 pages of the 13-page Amended Motion to Dismiss.</td>
</tr>
<tr>
<td>09/04/14</td>
<td>KLB</td>
<td>2.5</td>
<td>Draft reply brief related to motion to Dismiss.</td>
<td>1,250.00</td>
<td>Defendant has not segregated time related to TCPA from contract matters. Five pages of the 10-page Reply Brief concerns contract issues.</td>
</tr>
<tr>
<td>Date</td>
<td>Atty</td>
<td>Rate</td>
<td>Description</td>
<td>Amount</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>------</td>
<td>---------</td>
<td>------------------------------------------------------------------------------</td>
<td>--------</td>
<td></td>
</tr>
<tr>
<td>09/05/14</td>
<td>KLB</td>
<td>2.10/150</td>
<td>Continue draft of reply brief.</td>
<td>1,050.00</td>
<td></td>
</tr>
<tr>
<td>09/06/14</td>
<td>LLB</td>
<td>1.8/150</td>
<td>Draft and revise Reply in Support of Motion to Dismiss.</td>
<td>270.00</td>
<td></td>
</tr>
<tr>
<td>09/08/14</td>
<td>KLB</td>
<td>2.0/150</td>
<td>Finalize reply in support of motion to Dismiss.</td>
<td>1,000.00</td>
<td></td>
</tr>
<tr>
<td>09/08/14</td>
<td>LLB</td>
<td>.5/150</td>
<td>Revise and ensure citation accuracy of Reply in Support of Motion to Dismiss.</td>
<td>75.00</td>
<td></td>
</tr>
<tr>
<td>09/10/14</td>
<td>KLB</td>
<td>3.0/150</td>
<td>Prepare for hearing on motion to dismiss.</td>
<td>1,500.00</td>
<td></td>
</tr>
<tr>
<td>09/10/14</td>
<td>LLB</td>
<td>.7/150</td>
<td>Conduct research regarding case law citing in Reply to Response to Motion to Dismiss, in preparation for hearing on Motion to Dismiss.</td>
<td>105.00</td>
<td></td>
</tr>
<tr>
<td>09/11/14</td>
<td>KLB</td>
<td>3.8/150</td>
<td>Prepare for and attend hearing on motion to dismiss. Confer with A. Ruder regarding hearing and decision.</td>
<td>1,900.00</td>
<td></td>
</tr>
<tr>
<td>11/05/14</td>
<td>KLB</td>
<td>2.0/150</td>
<td>Continue review of appellant’s brief; pursue admissions and review of agreements to pursue summary judgment issues and evidence.</td>
<td>1,000.00</td>
<td></td>
</tr>
<tr>
<td>12/11/14</td>
<td>KLB</td>
<td>2.0/150</td>
<td>Review revised draft of appeals brief; confer with opposing counsel re schedule.</td>
<td>1,000.00</td>
<td></td>
</tr>
<tr>
<td>12/16/14</td>
<td>KBL</td>
<td>1.0/150</td>
<td>Review final appellate brief; pursue motion for continuance.</td>
<td>500.00</td>
<td></td>
</tr>
</tbody>
</table>

Defendant has not segregated time related to TCPA from contract matters. Five pages of the 10-page Reply Brief concerns contract issues.

This description includes time related Defendant’s request for admissions to Bill Jordan, William Davis Real Estate Services, LLC, and Kathy Jabri solely concerning Listing Agreement, and related issues. True and correct copies of the Requests for Admission are attached hereto under Tab 4.

I believe description refers to opposing counsel’s request to stay and continue the proceedings related to the breach of contract claims until the Court of Appeals rendered an opinion on the defamation claims. My time entries do not show a conference on 12/11/14, but do include entries for email correspondences during that week related to this issue.

Part of entry involves Motion for continuance and stay of contract claims pending Court of Appeals Decision.
9. Defendant has also included attorneys' fees in her claim that appear completely unrelated to her defense of the defamation claims. The following is a summary of the time entries I believe solely involve attorney time expended in defense of Plaintiffs' breach of contract claims, along with my observations:

<table>
<thead>
<tr>
<th>Date</th>
<th>Atty</th>
<th>Rate</th>
<th>Description</th>
<th>Amount</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>08/11/14</td>
<td>KLB</td>
<td>.50</td>
<td>Draft letter to K. Lafferty regarding dismissal of claims.</td>
<td>250.00</td>
<td>I have attached a true and correct copy of two correspondences received from opposing counsel under Tab 1. Neither references the defamation claims.</td>
</tr>
<tr>
<td>08/12/14</td>
<td>KLB</td>
<td>3.5</td>
<td>Pursue research re potential defenses and claims related to real estate contract.</td>
<td>1,750.00</td>
<td>This entry states research related to the contract issues, and makes no reference of the defamation claims.</td>
</tr>
<tr>
<td>09/03/14</td>
<td>KLB</td>
<td>0.2</td>
<td>Prepare subpoena to Bill Jordan for hearing.</td>
<td>100.00</td>
<td>Defendant's Motion to Dismiss alleged that Plaintiffs did not have a brokerage license, thereby precluding the award of broker fees under the contract. I believe Mr. Jordan was subpoenaed to address this issue rather than any issue involving the defamation claim, especially considering Kathy Jabri—the subject of the defamation claim—was not issued a subpoena.</td>
</tr>
</tbody>
</table>

Based on the information provided, it appears that the above-identified $2,100 in claimed attorney fees do not relate to Defendant's defense of the defamation claims, and should be excluded.

10. Defendant did not provide any information regarding the experience, reputation, and ability of "LLB," who the itemized fee statement provided by Plaintiff identifies as an attorney handling the work. Accordingly, I do not have sufficient information to provide an opinion as to whether "LLB's" hourly rate is reasonable. Kennedy Barnes has indicated an hourly rate of $500.00 for his legal services. This fee is disproportionate to the fees customarily charged in Collin County for the same or similar services of an attorney handling a simple breach of contract and defamation claims. In my experience, attorneys practicing in Collin
County and handling similar cases charge in the range of $200 to $300 per hour for their services.

11. On January 12, 2015, during a discussion following depositions of witnesses for the case, Kennedy Barnes disclosed to me that, while the firm could forego attorneys' fees for Defendant, she was responsible for paying the out-of-pocket expenses related to the case. Based on his comments, I had the impression that Defendant's counsel is providing pro bono legal services for Defendant, and that she is not expected to pay the attorneys' fees in this case.

12. Finally, I attest that the documents referenced above and produced under Tabs 1-4 are true and correct copies of the originals.

13. This concludes my affidavit. I declare under penalty of perjury that the foregoing is true and correct.”

Kimberly Lafferty

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 19th day of August, 2015, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas
AFFIDAVIT OF JOHN W. BRIDGER

Before me, the undersigned authority, on this day appeared John W. Bridger, who being by me duly sworn upon oath, did state as follows:

1. My name is John W. Bridger. I am over eighteen years of age and competent to make the following affidavit. The fact stated herein are true and correct and are within my personal knowledge.

2. I am an attorney licensed to practice in the State of Texas practicing in Houston, Texas. I am a partner with the law firm of Strong Pipkin Bissell & Ledyard, LLP (“Strong Pipkin”). I was licensed in 1985. I am Board Certified in Personal Injury Trial Law (1990) and Civil Trial Law (1992). My practice includes both personal injury and commercial litigation. I recently spent five years as the editor of the Texas Association of Defense Counsel’s Commercial Law Newsletter. I have recently written on the subject of prosecuting and defending attorneys’ fees claims under Chapter 38 of the Texas Civil Practice & Remedies Code. I have attached as Exhibit 1 and incorporated herein a true and correct copy of my webpage, which accurately reflects a more detailed description of my qualifications to render an opinion on attorneys’ fees.

4. I am one of the counsel of record for The ABC Company ("ABC Company"), along with my partner, Michael Bridwell, and senior associate, David Kirby. I am personally familiar with both Mr. Bridwell and Mr. Kirby and the work they do. I have attached and incorporated herein a true and correct copy of Mr. Bridwell’s webpage (Exhibit 2) and Mr. Kirby’s webpage (Exhibit 3), which accurately reflect a more detailed description of their qualifications. Koriane Lee is the paralegal assigned to this file and a true and correct copy of her resume, which accurately reflect a more detailed description of her qualifications, is attached as Exhibit 4 and incorporated herein.

5. In order to render my opinion, I have reviewed the Strong Pipkin invoices reflecting the contemporaneous billing records regularly made by our firm. We generally enter time daily. I have attached true and correct, redacted copies of those invoices as Exhibit 5. These records reflect the date of the task performed, the description of the task performed, the time required to perform the task, the identity of the attorney or paralegal performing the task, and the billing rate of the person performing the task. By way of further explanation, the identities are listed by initials: MTB is Michael Bridwell, JWB is John Bridger, DAK is David Kirby, and KNL is Koriane Lee. I have also reviewed the accounts receivable payment history, which reflects that all of the attached invoices have been paid. In addition to the invoiced time, I have also reviewed the original work in progress time from our billing program, a true and correct, redacted copy of which I have attached as Exhibit 6. Like the Strong Pipkin invoices, our work in progress reflects the contemporaneous billing records regularly made by our firm. Like the Strong Pipkin invoices, the
work in progress records reflect the date of the task performed, the description of the task performed, the time required to perform the task, the identity of the attorney or paralegal performing the task, and the billing rate of the person performing the task. Finally, as counsel of record, I am familiar with all of the work on this file.

6. Exhibits E and F are Business Records as that term is defined by Texas Rule of Evidence 803(6). More specifically, as a partner in Strong Pipkin, I am a custodian of such records and would show that these are exact duplicates of original records. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. The records were kept in the course of regularly conducted business activity. It is the regular practice of Strong Pipkin to make the records.

7. Furthermore, pursuant to the Texas Civil Practice & Remedies Code § 18.001, I would show that I am one of the persons in charge of billing records of Strong Pipkin. Attached to this affidavit are records that provide an itemized statement of the services and the charge for the services provided on the dates stated in the invoice and pre-bill. The attached records are a part of this affidavit. The attached records are kept by my firm in the regular course of business. The information contained in the records are kept by my firm in the regular course of business by or an employee or representative of who had personal knowledge of this information. The records were made at or near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original. The services provided were necessary and the amount charged for the services was reasonable at the time and place that the service was provided.

8. I have reviewed all the time entries on invoices issued by Strong Pipkin to ABC Company and on the work in progress for time to be invoiced during the next two billing cycles
(April time entries later in May and May time entries in June). All of the work on this matter was performed by either Mr. Bridwell, Mr. Kirby, Mrs. Lee, or me. Mr. Bridwell is a senior partner with 32 years experience who charged $350 per hour. I am a senior partner with 32 years experience who charged $300 per hour. Mr. Kirby is a senior associate with 8 years experience who charged $200 per hour. Finally, Mrs. Lee is a paralegal with 7 years experience who charged $90 per hour. Mrs. Lee performed substantive legal work under the direction and supervision of either Mr. Kirby or me. Based on my knowledge of the rates charged for commercial litigation in both Houston and Beaumont by attorneys and paralegals of our experience, this is an eminently reasonable hourly rate for this matter.

9. Although Arthur Anderson noted eight factors for consideration in awarding attorneys’ fees, a trial court is not required to receive evidence on all of the Arthur Anderson factors and, where the evidence is lacking, a trial court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties. See Permian Power Tong, Inc. v. Diamondback E&P, LLC, No. 12-16-92-CV, 2017 Tex. App. LEXIS 5414, at *41, 2017 WL 2588158, (Tex. App.—Tyler May 31, 2017) judgment set aside on other grounds, opinion not vacated sub nom., 2017 Tex. App. LEXIS 6026, 2017 WL 2824311 (Tex. App.—Tyler June 30, 2017, pet. denied) (citing Hagedorn v. Tisdale, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.)).

10. The invoices and work in progress, which are relatively self-explanatory, provide the necessary proof to establish the requested attorneys’ fees. They show the services performed, who performed them, at what hourly rate (hourly rates are identified on the last page of each invoice), when they were performed, and how much time the work required. Texas jurisprudence recognizes this as sufficient proof of attorneys’ fees. The Texarkana Court of Appeals has recently
recognized what constitutes the sufficient proof to recover under the traditional, *Arthur Anderson* methodology.

While *Arthur Anderson* set forth factors that should be considered by the fact-finder, the court “did not mandate that such evidence must be admitted or considered.” *Robertson Cty v. Wymola*, 17 S.W.3d 334, 345 (Tex. App.—Austin 2000, pet denied); see Tex. Disciplinary R. Prof. Conduct 1.04 (discussing the factors that “may be considered”). Thus, “[a] trial court is not required to receive evidence on each of these factors...” *Eitel v. Horobec*, No. 02-12-00500-CV, 2014 Tex. App. LEXIS 1690, 2014 WL 584780, at *5 (Tex. App.—Fort Worth Feb. 13, 2014, no pet.) (mem. op.) (citing *Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 214 (Tex. App.—Fort Worth 2011, pet. denied)); *Hagedorn v. Tisdale*, 13 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.). More recently, the Texas Supreme Court has written, “Sufficient evidence includes, at a minimum, evidence of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.” *Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012)).


11. To date, Strong Pipkin attorneys and paralegals have spent at least 81.40 hours prosecuting ABC Company’s claims against John Paul Jones, II and John Paul Jones, III (“Jones”) beginning January 20, 2017, through the date of filing ABC Company’s Motion for Summary Judgment. The total amount of attorneys’ fees and expenses incurred prosecuting ABC Company’s breach of contract claim against the Joneses beginning January 20, 2017, through the date of filing ABC Company’s Motion for Summary Judgment (on May 16, 2018) is $21,099.68.

12. In its Original Petition, ABC Company pled only one cause of action against each of the Joneses, specifically breach of contract. Attorneys’ fees are recoverable for breach of contract. *See* Texas Civil Practice & Remedies Code § 38.001(8). As there is only one cause of
action and Chapter 38 provides the recovery of attorneys’ fees for that cause of action, Chapter 38 jurisprudence does not require ABC Company to segregate fees. See generally Tony Gallo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006), which recognizes the need for segregation of fees only where one or more causes of action for which attorneys’ fees are not recoverable are pled. Further, each Personal Guaranty provided for recovery of expenses, including attorneys’ fees. See Paragraph No. 6 of the Continuing Guaranty of John Paul Jones, II and Paragraph No. 2 of the Personal Guaranty of John Paul Jones, III. The language of the guaranties provides that: (1) “Guarantor agrees to pay expenses, including attorneys’ fees, reasonably incurred by Chevron in efforts to collect or enforce any Indebtedness or this Guaranty” and (2) “Guarantor will pay the reasonable costs and expenses, including reasonable attorney's fees, incurred by the Guaranteed Party to collect the underlying indebtedness or enforce any of its rights hereunder; provided, however, that such costs and expenses shall be payable by Guarantor only to the extent the Guaranteed Party is successful in enforcing this Guaranty.” Thus, the contractual provisions do not require segregation of fees. See generally www.ubran.inc v. Drummond, 508 S.W.3d 657, 672 (Tex. App.—Houston [1st Dist.] 2016), judgment vacated, 2017 Tex. App. LEXIS 1284 (Tex. App.—Houston [1st Dist.], Feb. 7, 2017).

13. Prior to issuing an invoice, Mr. Bridwell reviewed all time in this matter for reasonableness, necessity, excessiveness, duplication, adequate documentation, and efficiency. Time deemed to be unreasonable or excessive was reduced. Time deemed to be unnecessary or duplicative was cut. The overall bill was evaluated for efficiency in providing a reasonable service for the nature and size of the claim. Inadequately documented time was corrected, reduced, or cut. A reasonable effort was made to have the work performed by the person with the lowest hourly rate capable of competently performing the task. Every effort was made to use good “billing judgment” before issuing an invoice to the client. Black v. SettlePou, P.C., 732 F.3d 492, 502 (5th
Cir. 2013) (citing Saizan v. Delta Concrete Prods. Co., Inc., 448 F.3d 795, 799 (5th Cir. 2006)); see also El Apple, 370 S.W.3d at 762-63.

14. The time and expenses incurred prosecuting ABC Company’s suit claim against the Joneses were reasonable and necessary to prepare investigate ABC Company’s claim, prepare ABC Company’s Original Petition, review Jones’s Answer, research the relevant issues, and to research and prepare ABC Company’s Motion for Summary Judgment and the supporting affidavits.

15. Accordingly, in my opinion, ABC Company has incurred to date $20,449.00 in reasonable and necessary attorneys’ fees to prosecute ABC Company’s suit on account and breach of contract claims against Jones.

16. However, I can reasonably anticipate that additional work will need to be done. The time incurred prosecuting ABC Company’s suit on account claim against Jones does not include time spent replying to any response to ABC Company’s Motion for Summary Judgment against Jones file by Jones, nor does it include any time preparing for and arguing ABC Company’s Motion for Summary Judgment against Jones in Court, if the motion is not taken under submission. If necessary, I anticipate that reasonable and necessary attorneys’ fees incurred by persons at this firm replying to any response filed by Jones, including reviewing the response, gathering rebuttal evidence, and preparing ABC Company’s reply, will total $5,000 (representing an anticipated 20 worth of work at a blended rate of $250 per hour). Further, if a hearing is required, I would anticipate an additional seven hours for preparing (4 hours), traveling to and from the hearing (2 hours), and attending the hearing (1 hour). Thus, if ABC Company’s Motion for Summary Judgment requires a hearing, then I would anticipate an additional $2,100 in fees (7 hours at the rate of $300 per hour).

17. I have handled appeals in commercial matters. In the event the motion for summary
judgment is granted and this case is appealed to the Court of Appeals, a reasonable fee for preparing a brief would be $20,000.

18. In the event a petition for review to the Texas Supreme Court is filed or responded to, a reasonable fee for the related appellate tasks would be $10,000.

19. If a petition for review was granted, a reasonable fee for preparing briefs on the merits, arguing the case and related appellate tasks if $20,000.

20. Additionally, pursuant to the terms of the Continuing Guaranty and the Personal Guaranty, ABC Company is entitled to recover expenses. The expenses are listed on the Page 1 of each invoice. Internal charges are detailed at the back of each invoice. There are no mark ups for outside vendor charges (such as postage, long distance, courier services, etc.). Copies are charged at 10 cents per page. These expenses were reasonable and necessary. The total amount of expenses was $650.68, which includes taxable court costs as identified in the attached invoices in Exhibit E.

21. I would note that ABC Company has satisfied all conditions precedent to recovering attorneys’ fees in this claim. While the contract does not require presentment of the claim, Chapter 38 does. ABC Company pled presentment in Paragraph No. 16 of its Original Petition, stating that it presented the claim by way of formal demands for payment on Paul Jones and Jake Jones under their personal guaranties as early as August 20, 2015, as well as the Joness failure to pay the debt owed. Further, in Paragraphs Nos. 21 and 27 of the Plaintiff’s Original Petition, ABC Company has pled that all conditions precedent have been satisfied. Presentment has been described as a condition precedent. See Beauty Elite Group, Inc. v. Palchick, No. 14-07-00058-CV, 2008 Tex. App. LEXIS 1918, at *14. See also Pike v. Tex. EMC Mgmt., LLC, No. 10-14-00274-CV, 2017 Tex. App. LEXIS 5217, at *55-57 (App.—Waco May 31, 2017, pet. filed).

As a condition precedent, Rule 54 requires the defendant to specifically deny each condition precedent the defendant intends to contest. If the plaintiff properly pleads and the defendant does
not specifically deny presentment, the plaintiff need not put on evidence of presentment. See *Pike*, 2017 Tex. App. LEXIS 5217, at *55-57 (explaining that while the debtors/defendants plead that “all conditions precedent necessary . . . have not occurred,” this language did not satisfy the specific denial requirement of Rule 54 and the debtors/defendants had waived their right to complain on appeal); *Beauty Elite*, 2008 Tex. App. LEXIS 1918, at *15 (citing *Landscape Design & Constr., Inc. v. Harold Thomas Excavating, Inc.*, 604 S.W.2d 374, 378 (Tex. App.—Dallas 1980, writ ref’d n.r.e.) (rejecting defendant’s argument there was no evidence of presentment because it was not raised in the trial court); *Trout v. Patterson*, No. B14-93-00149-CV, 1994 Tex. App. LEXIS 981, at *6 (Tex. App.—Houston [14th Dist.] April 28, 1994, writ denied) (same). Here, the Jones have not pled a specific denial of the conditions precedent. Therefore, ABC Company need not introduce evidence of presentment and rests on its pleadings.

22. Further, ABC Company pled for recovery of attorneys’ fees in Paragraph No. 28 of its Original Petition as well as seeking attorneys’ fees in its Prayer at sub-paragraph c. Finally, ABC Company has proven its right to recover its attorneys’ fees by submission of its attorneys’ invoices and work in progress records (constituting contemporaneous billing entry records) and this affidavit, which includes not only expert opinions, but evidence of business records satisfying Texas Rules of Evidence 803(6) and 902(10) and cost and necessity under Texas Civil Practice & Code § 18.001.

23. I reserve the right to supplement this affidavit with analysis of any additional time spent prior to entry of a judgment or to address issues raised in any response.

FURTHER AFFIANT SAYETH NAUGHT.

[Remainder of page intentionally blank with signature block on following page.]
Signed under the pains and penalties of perjury on the 10th day of May, 2018.

JOHN W. BRIDGER

SUBSCRIBED AND SWORN TO before me by the said John W. Bridger on this the 10th day of May, 2018, to certify which witness my hand and seal of office.

KORIANE N. LEE
My Notary ID # 128648515
Expires June 17, 2019
Notary Public State of Texas
John W. Bridger
713-210-4380
jbridger@strongpipkin.com

Primary Practice Areas

- Commercial Litigation:
  - Prosecuted and defended indemnity actions for major oil companies, petrochemical companies, and specialty steel producers (including innovative use of Chapter 82 indemnity) and wrote the indemnity provision used by a major chemical company.
  - Successfully invoked forum selection, choice of law, limitations, and arbitration clauses in contract cases.
  - As lead counsel, successfully prosecuted at trial (and held on appeal) breach of warranty claim against limited partnerships, its general partners, and its limited partners (obtaining personal liability against the limited partners) on a case arising from sale of a business.
  - As lead trial counsel, successfully defended (to defense verdict) Deceptive Trade Practices Act (DTPA) and breach of warranty action against car dealer.

- Toxic Tort Litigation:
  - As lead trial counsel, successfully defended (unanimous defense verdict) in Beaumont (Jefferson County) maintenance and cure case in Jefferson County.
  - As co-counsel, successfully defended (and held on appeal) in Beaumont (Jefferson County) Jones Act employer from gross negligence allegations in an unseaworthiness case (*Penrod Drilling Corp. v. Williams*, one of the first post-*Miles* cases to so hold).
  - In maritime collision case involving 450 plaintiffs claiming exposure to chemicals released as a result of the collision, successfully obtained in Galveston summary judgment on duty for ship owner.
  - In maritime wrongful death case, successfully obtained in Beaumont (Jefferson County) summary judgment on duty for terminal.

- Maritime Law:
  - As lead counsel, successfully defended (to defense verdict) in Beaumont federal court (and held on appeal) marine terminal lost profit claim in Oil Pollution Act claim.

- Personal Injury Defense:
  - As lead trial counsel, successfully defended (defense verdict) in Orange a local water supply company in brain damage case.

John's practice includes a wide variety of civil and maritime litigation, including tort and commercial disputes. He has tried over 70 cases to verdict. He frequently defends personal injury and property damage claims typically occurring on or at chemical plants, refineries, fabrication shops, docks, marine terminals, vessels, offshore oil rigs and platforms, and construction sites. These cases regularly involve claims of negligence, gross negligence, personal injury, premises liability, products liability, maritime law, toxic tort, and contribution and indemnity.

John also handles a variety of commercial and contractual matters, including claims arising from breach of contract, insurance and indemnity disputes, and maritime bunkers sales.

John looks for creative, innovative, and efficient means to pursue his clients’ litigation goals.
Publications


Prosecuting and Defending Attorneys' Fees in Texas: A Primer (lead author and presenter), Texas Association of Defense Counsel, 2017 Annual Meeting

TADC Commercial Litigation Newsletter Editor Fall 2012 to Spring 2017

Education

University of Texas School of Law (with honors), J.D., 1985
Baylor University, B.A. (magna cum laude), 1982

Memberships/Affiliations

American Board of Trial Advocates
State Bar of Texas
Texas Association of Defense Counsel
Defense Research Institute
College of the State Bar of Texas
Houston Bar Association
Jefferson County Bar Association
Co-editor of TADC Commercial Law Newsletter

Honors and Awards

ABOTA Advocate
AV rated, Martindale Hubbell
AVVO “Superb” Rating – 10/10
The Best Lawyers in America® (2012-present)
  Commercial Litigation
  Personal Injury Litigation – Defendants

Board Certifications – Texas Board of Legal Specialization

Civil Trial law (since 1992)
Personal Injury Trial Law (since 1990)

Admissions

All Texas courts
U.S. District Courts for Eastern, Southern, Northern, and Western Districts of Texas
U.S. Court of Appeals – Fifth Circuit

Speaking Engagements

Chairman, Mealey’s Asbestos Litigation 101 Conference, New Orleans, LA, July 2005
TADC Fall Meeting, San Antonio, TX, September 2004, Answering a Complaint - Comparing State and Federal Practice
Mealey’s Asbestos Litigation 101 Conference, Dallas, TX, June 2003, Non-Traditional Defendants in Asbestos Litigation
In-house continuing education for a commercial insurance broker, Houston, TX, March 2003, A Manufacturer’s Statutory Duty to Indemnify a Seller in Products Liability Action

- As lead trial counsel, successfully defended (unanimous defense verdict) in Galveston 16 specialty steel producers and suppliers in nickel and hexavalent chromium inhalation case involving heart and lung injuries with past medical bills exceeding $1 million
- As trial counsel, successfully defended at trial and on appeal (defense verdict in all but two claimants with hose two reversed on appeal to Fifth Circuit) asbestos supplier in Cimino class action trial in federal court in Beaumont
- As trial counsel, successfully defended (to defense verdict) asbestos product manufacturer in consolidated in Orange, class action in Beaumont and consolidated and individual action in Philadelphia
- In Gulf War Syndrome case (putative class action), successfully obtained in Brazoria County dismissal of manufacturer, which had pled guilty in companion criminal case, based on motion for summary judgment that, in part, invoked international treaties defining bio-chemical weapons

- Premises Liability:
  - Defended major oil companies, petrochemical companies, and public housing authorities in premises liability

- Products Liability:
  - In products liability cases, represented manufacturers of products including: cranes, man lifts, valve actuators, paper mill equipment, plastic gas cans, bicycles, steel plate, cluster bombs, tires, welding equipment, and tire rims
  - Texas counsel for several product defendants in asbestos litigation
  - Successfully prosecuted Daubert challenges to medical and liability expert witnesses resulting in their exclusion
  - As lead trial counsel, successfully defended to unanimous defense verdict in federal court in Houston, a major retailer against claims that a defective bicycle caused an accident resulting in hip replacement
  - As co-counsel, successfully defended to a defense verdict in federal court in Marshall, a gas can manufacturer in a burn death case

- As lead trial counsel, successfully defended (defense verdict in Kountze (Hardin County) trucking company in wrongful death suit
- As lead trial counsel, successfully defended (to unanimous defense verdict) at trial in Houston federal court, major retailer in fall resulting in hip replacement

- Successfully prosecuted Daubert challenges to medical and liability expert witnesses resulting in their exclusion
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- As lead trial counsel, successfully defended (defense verdict in Kountze (Hardin County) trucking company in wrongful death suit
- As lead trial counsel, successfully defended (to unanimous defense verdict) at trial in Houston federal court, major retailer in fall resulting in hip replacement
Michael Bridwell has been practicing with Strong Pipkin since graduating from University of Texas School of Law in 1985. He is an experienced litigator and handles personal injury, premises liability, products liability, toxic tort, commercial litigation, general litigation, occupational and environmental chemical exposure, asbestos and contract litigation. He has represented companies in premises liability cases, products liability cases, severe burn personal injury cases, groundwater contamination cases, community chemical exposure cases, and pipeline right of way and eminent domain disputes. He is also a certified mediator. Representative clients include oil and chemical companies, product manufacturers, pipeline companies and insurers.

Primary Practice Areas:

- Personal Injury
- Premises Liability
- Products Liability
- Toxic Tort Litigation
- Commercial Litigation
- Environmental Litigation

Representative Experience:

- Represented local chemical manufacturing facility in litigation involving thousands of plaintiffs claiming personal injury based on claims of air pollution and community exposures;
- Defended local refinery in alleged ground water contamination case involving hundreds of nearby residents;
- Represented pipeline companies in pipeline rupture cases involving claims of environmental damage and catastrophic burns;
- Counsel for steering gear manufacturer in tanker/tug boat collision and death case;
- Represented industrial pump manufacturer in catastrophic burn and death case;
- Defended several oil and chemical companies in asbestos litigation on a statewide basis;
- Represented pipeline companies in easement, right of way, and eminent domain negotiations and suits; and
- Served as panel counsel for several insurance companies.
- Successfully tried a products liability death case on behalf of gasoline can manufacturer

Honors and Awards:

- Martindale-Hubbell AV rated
- The Best Lawyers In America® (2012-2018)
  - Commercial Litigation
  - Mass Tort Litigation
  - Product Liability Litigation
Membership/Affiliations:

- Texas Board of Legal Specialization Personal Injury Trial Law - 1990
- Federation of Defense & Corporate Counsel (FDCC)
- Certified Mediator, A.A. White Dispute Resolution Institute
- All Texas Courts
- U. S. District Courts for Eastern, Southern, Northern and Western Districts of Texas
- U.S. Court of Appeals—Fifth Circuit
- U.S. Supreme Court
- Texas Association of Defense Counsel (TADC)
- American Board of Trial Advocates (ABOTA)
- Texas Bar Foundation—Life Fellow
- American Inns of Court, Michelle Mehaffy Chapter (President 2014, 2015)
- Jefferson County Bar Association
- Arkansas Bar Association
- All Arkansas Courts
- Oklahoma Bar Association
- All Oklahoma Courts
- U. S. District Courts for Eastern, Western and Northern Districts of Oklahoma

Education:

- University of Texas School of Law, J.D., 1985
- Michigan State University, BA with Honors, 1981

Articles and Presentations:

- Condemnation Update and Easement Maintenance Issues (author and presenter), May 2013
- Easement Rights Pertaining to Multiple-Pipeline Grants and Update on Texas Easement Issues (author and presenter), November 2010
- Sun Tzu and the Art of Mediation (author and presenter), Texas Association of Defense Counsel Winter Seminar, January, 2009
- Mediation Tips for Litigants: Don’t Meet Me In The Middle (author and presenter), Texas Association of Defense Counsel Summer Seminar, July, 2004
- Creating and Managing a Case Budget (author), The Advocate, June, 2006
- Taking The Plaintiff’s Deposition (author and presenter) Jefferson County Bar Association, April, 2006
DAVID A. KIRBY
713-210-4384
dkirby@strongpipkin.com

David Kirby represents businesses and individuals in arbitration, litigation, and appellate matters, including insurance, commercial, oil & gas, contract, personal injury, products liability, and premises liability disputes.

His practice also focuses on commercial risk management, where he advises clients on insurance coverage, contractual risk shifting, internal policies & procedures, and service contracts.

Outside of work Mr. Kirby enjoys spending time with his lovely wife, Leslie, and their son. On occasion, he is able to slip away for a round of golf.

Primary Practice Areas

- **Insurance Coverage Litigation:**
  - Review and assess coverage under a variety of insurance policies, including commercial liability, commercial property, commercial auto, business owners package, pollution liability, professional liability, directors and officers, employee practices, cyber liability, umbrella/excess liability, and others.
  - Assist clients in establishing claim programs in mass tort settings and in identifying historical coverage for “long tail” liability.
  - Pursue coverage under insurance policies through negotiation, mediation, arbitration, and/or litigation.

- **Products & Premises Liability:**
  - Lead clients through catastrophic injury and commercial litigation based on claims of defective vehicles, tires, underground storage tanks, resins, asbestos-containing materials, and other products.
  - Handle premises litigation for pipeline, refinery, manufacturing, construction, and other businesses.
  - Assist with claims arising from allegations of negligence, defective design, defective manufacture, defective marketing, strict liability, breach of warranty, and deceptive trade practices as well as defenses to liability based on independent contractor status and Chapter 95.

- **Business Law:**
  - Oversee small business formation, organization, transfer, and sale and draft related legal documents.
  - Review and analyze insurance policies and advise clients on appropriate insurance coverage and risk management programs.
  - Draft policies & procedures, contracts, risk shifting provisions, indemnity provisions, employment agreements, non-compete agreements, and others.
  - Counsel clients on general business matters.

- **Commercial Litigation:**
  - Represent business clients in breach of contract, tortious interference, breach of fiduciary duty, and fraud lawsuits.
  - Advise businesses and individuals with respect to covenants not to compete, confidentiality/non-disclosure agreements, and trade secrets.
  - Represent clients in arbitration proceedings.
  - Handle state and federal appeals.

- **Environmental Law:**
  - Represent clients with respect to CERCLA, OSHA, CWA, CAA, and OPA liability.
  - Advise oil and gas businesses in disputes related to claims brought by landowners and governmental entities for property damage arising from historic exploration and drilling activities, including Louisiana legacy liability claims.
  - Counsel businesses on environmental remediation.

Representative Experience

- Represented international flooring manufacturer in successful resolution of insurance dispute related to coverage under a series of umbrella policies for asbestos-related liability.
- Represented an individual in an investigation conducted by the U.S. Securities and Exchange Commission’s Office of International Affairs.
- Obtained arbitration award on behalf of major energy partnership in a breach of contract action involving a novel issue under the Louisiana Oilfield Anti-Indemnity Act.
- Obtained summary judgment in favor of client in relation to multi-million dollar insurance dispute regarding offshore drilling rigs damaged by Hurricane Ike.
Represented client in appeal to the Fifth Circuit concerning issues arising from the retrofit of a super-yacht.

Represented a drilling interest group as amicus curiae with respect to appeals to the Fifth Circuit stemming from the Deepwater Horizon litigation.

Successfully represented City of Gonzales in electrocution lawsuit.

Represented refinery service company in multi-fatality refinery explosion lawsuit.

Successfully represented individual in lawsuit against condominium association related to water intrusion into bedroom and living room.

**Education**

- South Texas College of Law, Doctor of Jurisprudence, 2010
  - Managing Editor, South Texas Law Review
  - Dean’s Scholar
- Sewanee: The University of the South, Bachelor of Science, 2006

**Memberships/Affiliations**

- State Bar of Texas
  - Insurance Section
  - Litigation Section
- American Bar Association
  - Litigation Section
- Houston Bar Association
  - Litigation Section
- Texas Association of Defense Counsel
  - Director, 2018-2019
  - Young Lawyer Chair, 2016-2017
- Defense Research Institute
  - Insurance Law Section
  - Tort Trial & Insurance Practice Section
- Bar Association of the Fifth Federal Circuit

**Admissions**

- All Texas Courts
- United States District Courts for the Southern, Eastern, and Western Districts of Texas
- United States Court of Appeals for the Fifth Circuit

**Honors and Awards**

- AVVO “Superb” Rating – 10/10
- Texas Bar Foundation, Fellow
- Texas Bar College, Member

**Publications**

- Prosecuting and Defending Attorneys’ Fees in Texas: A Primer, in TADC Annual Meeting Materials (2017)
- Issues of Coverage in the Tripartite Relationship: Must Counsel Protect the Client-Insured’s Coverage Interests?, TADC MAGAZINE (Fall/Winter 2016)
- Benefits of a Grief Counselor’s Testimony, TRIAL, Oct. 2011, at 41
CONTACT

✉️ koriane.nichole@gmail.com
📞 (281) 961-7938

UNIVERSITY OF HOUSTON
C.T. BAUER COLLEGE OF BUSINESS
[Houston, TX] 2010
Bachelors of Business Administration in Management

SKILLS

MS Office Suite
Word
Excel
Outlook
PowerPoint

iManage
PCLaw
Safe Harbour
Timeslips
Tabs3

WORK EXPERIENCE

STRONG, PIPKIN, BISSELL & LEDYARD, LLP
[Houston, TX]
Paralegal
2017 - Present
• Facilitate all aspects of litigation for a defense docket consisting primarily of negligence, premises liability and products liability cases
• Draft pleading, including petitions and answers
• Draft discovery requests and responses
• Manage trial docket and calendar for multiple attorneys, including scheduling of appointments and calendaring of litigation deadlines

DOW GOLUB REMELS & BEVERLY, LLP
[Houston, TX]
Legal Assistant
2013 - 2016
• Facilitate all aspects of litigation for a docket consisting primarily of breach of contracts and other commercial litigation cases
• Prepare monthly invoices to clients
• Prepare correspondence, pleadings, and discovery for filing with numerous courts
• Maintain correspondence between attorneys and clients from point of referral to trial and between attorneys and courts from filing of petition to trial
• Manage trial docket and calendar for multiple attorneys, including scheduling of appointments and calendaring of litigation deadlines

SPROTT, RIGBY, NEWSOM, ROBBINS & LUNCEFORD, PC
[Houston, TX]
Paralegal
2011 - 2013
• Facilitate all aspects of litigation for a defense docket consisting primarily of negligence, premises liability and products liability cases
• Maintain correspondence between attorneys and clients from point of referral to trial and between attorneys and courts from filing of petition to trial
• Prepare correspondence, pleadings, and discovery for filing with numerous courts
• Prepare cases for trial, including organizing and indexing exhibits, preparing demonstratives, and filing pretrial documents; attend trials to assist with exhibits and jury selection
• Manage high volume trial docket and calendar for multiple attorneys, including scheduling of appointments and calendaring of litigation deadlines

MAJOR ACCOMPLISHMENTS
Assisted attorneys at multiple trials:
• Preparation and management of court exhibits
• Attend voir dire for input on potential jurors

EXHIBIT 4
Re: [Redacted], John P., Jr., et al (2015.000204)

Professional Services Through 1/31/17
As per Time Exhibit Attached.............................................................. $4,930.00

Costs Through 1/31/17
Total Costs............................................................................................ $0.00

Total Invoice.................................................................................. $4,930.00
Receipts............................................................................................ $4,930.00

Balance Due................................................................................... $0.00
### Time Exhibit

**Re:** [Redacted], John P., Jr., et al  ( [Redacted] )

Invoice for services rendered through 01/31/17

<table>
<thead>
<tr>
<th>Date</th>
<th>Work Description</th>
<th>Hours</th>
<th>Initials</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/20/17</td>
<td>L120 Preliminary review of guarantees and research on specific jurisdiction on out of state execution of guaranty</td>
<td>1.20</td>
<td>JWB</td>
</tr>
<tr>
<td>1/23/17</td>
<td>L120 Conference with DAK re analysis of guarantees and case law</td>
<td>0.30</td>
<td>JWB</td>
</tr>
<tr>
<td>1/23/17</td>
<td>L110 Receipt and review correspondence regarding new claim</td>
<td>0.80</td>
<td>MTB</td>
</tr>
<tr>
<td>1/23/17</td>
<td>L190 Thornton: Reviewed case law and compiled list of issues to address with respect to personal jurisdiction over the guarantors as well as documents and information to request from [Redacted] to support a personal jurisdiction argument. [Redacted]</td>
<td>2.20</td>
<td>DAK-B</td>
</tr>
<tr>
<td>1/24/17</td>
<td>L120 Conference call with S. [Redacted] regarding developing factual basis for jurisdiction</td>
<td>0.40</td>
<td>JWB</td>
</tr>
<tr>
<td>1/24/17</td>
<td>L110 Telephone conference with S. [Redacted] regarding documents and potential meeting</td>
<td>0.40</td>
<td>MTB</td>
</tr>
<tr>
<td>1/24/17</td>
<td>L120 Thornton: reviewed additional case law regarding personal jurisdiction over a guarantor and also conducted background research on Thornton and Company, identifying Texas properties; Paul Thornton; and Jake Thornton.</td>
<td>1.20</td>
<td>DAK-B</td>
</tr>
<tr>
<td>1/30/17</td>
<td>L110 Prepare for meeting with clients</td>
<td>0.40</td>
<td>MTB</td>
</tr>
<tr>
<td>1/31/17</td>
<td>L110 Attend meeting with S. [Redacted] and B. [Redacted] at CPChem offices in The Woodlands</td>
<td>5.40</td>
<td>MTB</td>
</tr>
<tr>
<td>1/31/17</td>
<td>L110 Prepare for, to CPChem, and meeting with S. [Redacted], client representatives, and MTB developing case background and jurisdictional facts</td>
<td>4.10</td>
<td>JWB</td>
</tr>
</tbody>
</table>

**Total Hours**  16.40
# Time Allocation Exhibit

**Re:** [Redacted] John P., Jr., et al (Redacted)

Invoice for services rendered through 01/31/17

<table>
<thead>
<tr>
<th>Allocation Description</th>
<th>Hours</th>
<th>Rate</th>
<th>Fee</th>
<th>Initials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partner</td>
<td>7.00</td>
<td>350.00</td>
<td>$2,450.00</td>
<td>MTB</td>
</tr>
<tr>
<td>Partner</td>
<td>6.00</td>
<td>300.00</td>
<td>$1,800.00</td>
<td>JWB</td>
</tr>
<tr>
<td>Associate</td>
<td>3.40</td>
<td>200.00</td>
<td>$680.00</td>
<td>DAK-B</td>
</tr>
</tbody>
</table>

**Totals**  
16.40 | **$4,930.00**